LAW

RELATING TO

STOCKS, BONDS,

AND

OTHER SECURITIES,

IN THE

UNITED STATES.

BY

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PHILADELPHIA:
REES WELSH & CO.
1881.

SHERMAN & CO., PRINTERS.

PREFACE.

Before proceeding to the consideration of the subject matter of this book, the author desires to offer a word of explanation.

About three years ago, he began to collect some of the decisions bearing upon the subject of money securities, more especially Bonds and Stocks, which lie scattered through the now countless volumes of reports.

The work became extremely interesting, the more so, perhaps, because the particular path pursued was as yet untrodden.

It is not a little remarkable, when it is considered what an important factor in our financial affairs the Stock Exchange has become, that no attempt has as yet been made to assign it any distinctive place in legal literature.

When this is taken into consideration, some slight idea may be formed of the difficulties encountered in bringing the cases into any systematic arrangement. A few copies of this Essay were printed for private circulation during the winter of 1880. It is now reprinted by the advice of several of the author's friends, with the addition of chapters on Pledges and Wagering Contracts.

The author desires to express his thanks to those members of the Bar, and of the Board of Brokers who have rendered him much valuable assistance.

The author hopes it will not be forgotten that this work is hardly more than an *essay;* and that the only claim made for it is, that it aims to group the decisions and state the principles which govern some of the intricate branches of the Law of Money Securities.

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132 S. Third Street,
PHILADELPHIA, Jan. 10, 1881.

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CHAPTER I.

The Stock Exchange.

Speculation in English government stock is said to have begun about the close of the seventeenth century, and reached its climax in 1720, which is well known as the year of the South Sea Bubble.

When the bubble burst the wrath of the nation was visited upon the heads of the brokers, and the advisability of legislative interference was discussed. In the debates of the Commons it was said "that the present calamity is mainly owing to the vile arts of stock-jobbers, whereby the public funds are wound up far above their real value." The matter was referred to a committee, who reported that "nothing can tend more to the establishment of public credit than the preventing of the infamous practice of stock-jobbing."

The outcome of all the discussion was the passage, in 1734, of what is generally known as Sir John Barnard's Act, drawn by the gentleman whose name it bears, who was recognized as the greatest commercial

lawyer of his time; it was entitled "An Act to Prevent the Infamous Practice of Stock-jobbing." By its provisions jobbing in English stock was prohibited, but it was not intended to affect any transaction in which the actual transfer of stock was in any way contemplated.[1] This statute was restricted in its operation to British government securities, and did not extend to any other shares or stocks, home or foreign.[2] It was a carefully prepared and very lengthy act, and remained in force more than a century, but was repealed by 23 and 24 Vic. c. 28.

Dealers in stock continued a very unpopular class in England all through the last century. A prominent financier wrote, in 1757, that "funding and jobbing too often enrich the worst men and ruin the innocent. They taint men's morals, and deface all the principles of virtue and fair dealing. They have changed honest jobbing into bubbling, our traders into projectors, industry into trickery, and applause is earned when the pillory is deserved."[3]

It was the custom toward the close of the seventeenth century for brokers and jobbers to congregate about the Bank of England, and they were given authority by statute to carry on their dealings in the rotunda of that building.[4] But in 1698 the approaches

[1] Stat. 7 Geo. 2 c. 8, made perpetual by 10 Geo. 2 c. 8, Olivierson *v.* Coles, 1 Stark. 496.

[2] Williams *v.* Trye, 23 L. J. Ch. 860; Nicholson *v.* Gooch, 25 L. J. Q. B. 137.

[3] Britain's Commercial Interest, Explained and Improved by Postlethwayt, vol. iii, p. 23.

[4] 5 and 6 W. & M., c. 20, Sec. 20.

thereto became so obstructed, that they were compelled to move their quarters to Change Alley. At length the more respectable brokers hired a house in Capel Court, to which any one desiring to buy or sell stock was admitted on payment of a small fee.

So many objectionable persons, however, found an entrance under this arrangement that it became necessary to adopt some other method. Accordingly, in 1801 the present Stock Exchange was organized, the members of which are elected by ballot once every year. Those engaged in the negotiation of foreign funds and shares confined their operations to the halls in and around the Royal Exchange, until a comparatively recent period. It was not until 1835 that dealers in these securities were admitted to the Stock Exchange, which had previously confined its operations exclusively to government funds.

The London Stock Exchange now consists of two distinct bodies: 1. The shareholders or proprietors, who own the building where business is transacted, and who are interested as members of a joint stock undertaking. 2. The subscribers, or persons generally described as members of the Stock Exchange, or members of the house, who transact the business.[1]

The Paris Bourse consists of sixty *agents de change*, appointed by the government. Each must deposit 125,000 francs in the national treasury as a guarantee of good behavior, and also 100,000 francs with the

[1] Cavanagh's Law of Money Securities, 515.

syndicate of the Bourse, as a cautionary fund, applicable to losses sustained by the customer through the broker's fault.

A broker's seat is worth from a million and a half to two million francs, and cannot be sold without the consent of the governing committee.

There are sixty *courtiers de commerce* and eight *courtiers d'assurance* who transact much of their business at the Bourse. The *haussiers* and *baissiers* correspond to the American *bulls* and *bears*, and the *coulisse* to street or curbstone operators.

Cash sales are infrequent, and the greater part of the business is privilege, or technically *marché à prime*, the buyer deciding, on the 15th or 30th of the month, whether he will take the stock or not, but in either case having to pay the premium.

The *parquet* is in session every day for two hours.

The *coulisse* is in session through the day, and it includes a large number of female jobbers and speculators.

It will be necessary to a proper understanding of the English cases which will be noticed in this essay, that some brief explanation should be made of the method of dealing in the English Stock Exchange. Such a course is not rendered necessary as to this country, where the method is less cumbersome and more familiar. The members of the exchange are divided into two classes, brokers and jobbers. The former are the means of communication between the outside world and the jobbers. The latter are dealers in stocks and

shares, but with this distinction between their business and that of other dealers, that in very many instances no goods actually pass between buying and selling jobber, they being, as regards the actual vendor and purchaser, nothing more than middle-men. The point must be kept carefully in view that, as a rule, the actual transfer of stocks and shares, and payment of the price, is between outsiders, differences only being paid or received by the other parties to the transaction, a jobber only bargaining to find some one who will sell or buy the actual stock or shares.

It may be well at this point to sketch briefly an ordinary English stock transaction as the best method of explaining the system: A. has twenty shares in a certain company which he desires to sell, and he so instructs his broker. The broker asks a jobber who deals in that class of securities whether he will "make him a price for them." The jobber then names two prices, one at which he will buy, and the other at which he will sell. The broker informs him he has twenty shares for sale, but does not disclose the name of his principal. The custom then is for the broker to give to the principal a sold note, on which the name of the jobber is sometimes inserted. The original jobber may make a like bargain with a second jobber; and this may continue on indefinitely, no shares, however, passing until the broker of some outsider is found who is ready to buy, of course at the selling price of the last jobber concerned. The number of shares may by this time have become split up into smaller quantities,

and so have reached the hands of several buying brokers. The transaction will now rest until the "name-day," or "ticket-day," which is the day preceding the "settling-day," or "account-day."

For government stocks there is one, and for all other stocks two, fixed account-days in every month, on which days contracts for the account are performed, unless some new bargain is made by which the execution of the contract is annulled or practically deferred until the next account-day.

On the name-day the buying broker will have to pass a name, which will be that of his principal, or of some one put forward by his principal. This is done by passing to the jobber from whom the purchase is made a ticket, bearing the name of the intended transferee, the price at which the shares are bought, and the name of the paying broker. This ticket, or new tickets representing portions of it, if the shares have been originally sold by different persons, is passed from hand to hand, until it reaches the original selling broker.

The selling broker of shares is bound upon any sale to a member, whether jobber or broker, to accept, on the name-day, any name given to him for insertion in the transfer, unless he can show fraud.[1]

If the buying jobber fails to furnish a name by the name-day the selling broker may "sell out," and charge any loss to the jobber; so default of the seller to deliver stock he has sold within ten days entitles the buyer to buy in the stock against him.[2]

[1] Musgrave *v.* Hart, L. R. 5 Eq. 193.

[2] [illegible]

A seller may, upon payment of a premium, postpone the delivery of shares until the next settling-day; this is known as "backwardation." A buyer may do the same, and this is a "contango."

There are two settling-days in every month, and all bargains are made for a particular settling-day. It may be well to explain some of the technical terms used by brokers in England, and the qualification of them in this country:

A Bull is one who buys for settlement at a future date, with a view to gain by a rise in price in the interval.

A Bear is one who sells for future settlement, with a view to gain by a fall in price.

A Lame Duck is one who cannot meet his engagements.

An Option is a right to buy, sell, or do nothing, at a future time, at a certain price, with a view to gain by variations in the market prices, a premium being paid for this right.

Options are of three kinds:

1. A Put is an option to deliver stock or not, on a certain day, at a fixed price.

2. A Call is an option to claim stock or not, on a certain day, at a fixed price.

3. A Put and Call is an option to claim or deliver stock on a certain day, at a fixed price. This is known here as a "straddle."

The premium or option money is booked at the time the transaction is effected, and paid on the settling-day.

If the price is the same at the expiration of the option time as that originally fixed, the person paying the premium has always a right to declare whether he buys, sells, or does nothing.

Option account-day is the day before the account-day, or name-day.

Puts, calls, and options were within the provisions of Barnard's Act, but whether they are covered by the provisions of the present Betting Act has not yet received judicial investigation.[1]

The English definitions of Bull and Bear are too narrow for this country. Here any one is a Bull or Bear who is operating in any way for a rise or decline.

An option, with us, is the privilege of the buyer or seller, as the case may be, to receive or deliver stock, within a certain prescribed time, at a price agreed upon, usually with interest, but often, by stipulation, without interest, or, as it is termed, "flat."

A man is said to be "long" when he has bought stock which he expects to sell at an advance.

He is "short" when he sells stock which he does not possess, but which he anticipates buying at a decline.

A "shave" is a bonus paid for an extension of time, either for payment or delivery.

A "spread-eagle" is the operation of a broker who sells a large quantity of stock; for example, sixty days, buyer's option, and buys the same quantity at a lower

[1] London Stock Exchange Commissioners' Report, 1878, pp. 20–22.

price, on the same time, seller's option. If both contracts run their full time he makes his difference; but if the buyer or seller calls for a settlement before the time he may be seriously embarrassed.

The system of dealing in the Stock Exchange in the United States is extremely simple, and requires little explanation. The usual method is for the seller to execute a blank power of attorney, which is usually endorsed on the back of the certificate, and hand the certificate to his broker, who, when a purchaser is found, enters his name, which is passed to him by the vendee's broker, in the power, and executes the transfer on the books of the corporation, delivering the new certificate to the vendee's broker. Sales are for the next day, or at any time within sixty days. There are no jobbers, or name-days, or settling-days.

This cursory explanation of the system of dealing in the two countries will probably prove sufficient for all the purposes of this essay.

A few words now as to the nature and character of stock. The word in England is applied almost exclusively to government securities. Corporation and other stock comes under the general name of shares.[1] The question whether stock was to be considered as personal or real property was much agitated several years ago. There never was much doubt as to shares

[1] This distinction is too general to be strictly accurate. It is exact enough, however, for the purposes of this essay. I would refer those who desire to understand more thoroughly the distinction taken in England between stocks and shares to Cavanagh's Law of Money Securities, 495-503.

in a manufacturing, banking, or insurance corporation, but with reference to railroad, canal, bridge and turnpike companies, the law was not quite so clear. The weight of authority in both countries has always been in favor of treating them as personalty. In an early Connecticut case, however, shares in a turnpike company were held to be real estate,[1] but they were subsequently made personalty by statute.[2]

And in Kentucky a widow was allowed to claim her dower out of stock in a railroad company.[3]

The stock of the Cape Sable Company was made real estate by statute.[4]

It is now well settled, however, both in England and the United States that, even though the whole property of the corporation be real, and the whole of its business relate to real estate, provided it be the profit alone that is divisible among the members, the stock is personal.[5]

But it has been held in England, that where lands are vested, not in the corporation, but in the individual shareholders, and the corporation has only the power

[1] Welles *v.* Cowles, 2 Conn. 567,

[2] 2 Conn. Stat., May Session, 1818, c. 10.

[3] Price *v.* Price, 6 Dana 107.

[4] Cape Sable Company's Case, 3 Bland 606.

[5] Bligh *v.* Brent, 2 Y. & C. 268; Tippets *v.* Walker, 4 Mass. 595; Edwards *v.* Hale, 6 DeG. M. & G. 74; Bradley *v.* Holdsworth, 3 M. & W. 422; Thompson *v.* Thompson, 13 L. J. Ch. N. S. 455; Johns *v.* Johns, 1 Ohio St. 350; Howe *v.* Starkweather, 17 Mass. 243; Hutchins *v.* Bank, 12 Metc. 421; Denton *v.* Livingston, 9 Johns. 100; Brightwell *v.* Mallory, 10 Yerg. 196; Arnold *v.* Ruggles, 1 R. I. 165.

of management, in that case the shares are real property.[1]

It will be observed that all of the cases cited in support of these statements are old ones. The whole question was decided finally many years age, and is now too well settled to merit anything more than passing notice.

Mr. Williams, in his work on Personal Property, classes stock as a species of "incorporeal personal property," which is stated by Dillon, J., to be a very neat and accurate designation.[2] It is really nothing more than a chose in action, and trover will not lie for it, though it might for the certificate.[3]

It has, however, been recently held in Nevada, Utah, and California, that trover does lie for a share of stock.[4]

It was decided at a very early day, by Lord Kenyon, that stock was not money.[5] And Lord Langdale said in Douglas *v.* Congreve,[6] that a legacy of a sum of stock did not fall within the description of pecuniary legacies. So in Pennsylvania a bequest of "all money of mine that may remain in bank at the time of my death,

[1] Bligh *v.* Brent, 2 Y. & C. 268; Watson *v.* Spratley, 10 Exch. 222; Parsons on Contracts, 6 Ed. 35.

[2] Allen *v.* Pegram, 16 Iowa 173.

[3] Acraman *v.* Cooper, 10 M. & W. 585; Neiler *v.* Kelley, 19 P. F. S. 403.

[4] Boylan *v.* Huguet, 8 Nevada 345; Kuhn *v.* McAllister, 1 Utah 275; Payne *v.* Elliott, Reporter for May 26, 1880, Vol. IX, page 678.

[5] Jones *v.* Brinley, 1 East. 1.

[6] 1 Keen 410.

with all claims and demands of whatever nature," has been held not to pass bank and other stock.[1]

The general rule, as gathered from the cases, seems to be, that stock will pass under the term money in a will, only when a clear intention that it shall so pass can be inferred from the whole context.[2]

Stock being a chose in action, was originally incapable of being taken in execution for the payment of debts. This rule has, however, in many of the States been superseded by legislative enactments, and stock can now generally be reached by creditors like any other chattel.

In England stock and shares may, under the provisions of 1 and 2 Victoria, c. 110, ss. 14 and 15, be charged by a judge with judgment debts, and under the twelfth section of the same act be taken in execution.

In England trustees are not allowed to invest trust funds in the shares of any bank, or private or trading corporation.[3]

In Howe *v.* Dartmouth,[4] Lord Eldon said of bank stock: "It is as safe, I trust and believe, as any government security, but it is not government security, and therefore this Court does not lay

[1] Delamater's Est., 1 Whar. 362.

[2] Gosden *v.* Dotterill, 1 M. & K. 56; Cowling *v.* Cowling, 26 Beavan 449; Prichard *v.* Prichard, L. R. 11 Eq. 232; Morton *v.* Perry, 1 Met. 446; Paul *v.* Ball, 31 Texas 10; Fulkeron *v.* Chitty, 4 Jones Eq. 244; Newbold *v.* Prichett, 2 Wharton 46.

[3] Hynes *v.* Redington, 1 J. & L. 589; Clough *v.* Bond, 3 M. & Cr. 490; Powell *v.* Cleaver, 7 Vesey 142, n.

[4] 7 Vesey 150.

out or leave property in bank stock, and what this Court will decree, it expects from trustees and executors."[1] Lord St. Leonard's Act[2] permits trustees to invest in Bank of England, or Ireland, or East India stock. It has been said that the public policy in England of compelling trustees to invest trust funds in government securities, originated largely in the necessities of the government, and the public advantages of creating a market and demand for government funds.[3] The salutary English rule seems to have been adopted in New York and Pennsylvania.[4] These are probably the only two States which hold to the strict English custom.

In Massachusetts, trustees are allowed to invest in bank stocks, and stock of manufacturing and insurance corporations, or in notes of individuals secured by such stocks as collateral.[5] The Court justifies this rule in an elaborate opinion, affirming that such stocks are subject to no greater fluctuations than government securities; that they are as safe as real securities,

[1] Bawd *v.* Fardell, 7 DeG. M. & G. 628.

[2] 22 and 23 Victoria c. 35.

[3] Perry on Trusts, 2 Ed. Sec. 455.

[4] Ackerman *v.* Emott, 4 Barb. 626; Nyce's Est., 5 W. & S. 254; Morris *v.* Wallace, 3 Barr. 319; Hemphill's Ap., 18 Penn. 303; Pray's Ap., 34 Penn. 100.

[5] Harvard College *v.* Amory, 9 Pick. 446; Lovell *v.* Minot, 20 Pick. 116.

NOTE.—It is said that loans of the city of Boston always command a very large premium in the market, because the city of Boston can be sued upon its contracts, and a judgment against it can be satisfied by seizing upon an execution any property of any citizen within the municipal limits, while no suit can be maintained against the State, but everything depends upon the good faith and honor of the legislature in supplying the means of payment. Perry on Trusts, Par. 456.

which may depreciate in value or the title fail; that claims against such corporations can be enforced at law, while government funds can only be enforced by supplicating the sovereign power.

Where there is no statutory provision upon the subject, as is the case in most of the States, the trustee will be compelled to exercise a sound discretion in investing trust money, and it would nowhere be considered sound discretion to invest in the stock of new corporations, when the undertaking must in the nature of things be experimental; nor will it excuse the trustee that he subscribes his own money to such enterprises, as it is permitted to him to speculate with his own money if he sees fit.[1]

[1] Kimball *v.* Reding, 31 N. H. 352; Perry on Trusts, 546, 554; Johnson Ap., 9 Penn. 415.

CHAPTER II.

The Effect of Exchange Usages on Stock Contracts.

It is proposed in this section to consider how far the customs and usages of the Stock Exchange may be allowed to vary or interpret contracts for the purchase and sale of stock, and to what extent such customs are binding upon members of the Exchange, and those dealing through them.

It may be laid down as a general proposition, and one of almost universal applicability, that if a person becomes a member of an organization of his own free will and accord, he is bound by the laws and usages of the same, provided they contravene no law of the land or public policy.

If any authority were needed to support this proposition, it may be found in a case which involves the very customs of which we are now speaking. Plaintiff and defendant were both members of the Philadelphia Board of Brokers. The former had deposited with the latter several thousand shares of stock as collateral to secure a debt. The plaintiffs having failed to meet their engagements, defendants, acting under the usage of the Board, sold the collaterals to satisfy the debt. Several months after, the stock having advanced, plaintiffs tendered the full amount of their debt, and demanded a return of the stock. This was refused, and plaintiffs brought this action, basing their claim upon

the law that the sale of collaterals must be public, after due notice, and that a usage to the contrary was bad, and of no effect. The Court held, however, that where no statute or public policy interferes, but a rule of law, which is a mere privilege and may be waived, there is no reason why the waiver may not be as well by a custom known to and acquiesced in by the parties as by an express contract. Without intimating what would be the effect if such a usage as the present were set up against an outside party, the Court was of the opinion that, as between plaintiffs and defendants, both members of the Board of Brokers, familiar with and dealing on the basis of it, it is a valid and lawful custom, and controls the rights of the parties.[1]

But granting this to be the rule when the questions to be determined arise between members of the Exchange, is it the same when a non-member is involved? This question has received but little consideration upon this side of the Atlantic, but the English cases are very valuable, and will now be considered.

The first time that the question arose in England was in 1839, where a person employing a broker to sell shares, directed him by mistake to sell 250, meaning 50. The broker contracted with another broker on the Stock Exchange for the sale. The shareholder on the following day informed his broker of the mistake, and asked if the bargain could not be cancelled. The broker answered in the negative, and the share-

[1] Colket *v.* Ellis, 32 Leg. Int. 82.

holder then said he must leave the matter in his hands, to do the best he could. By the rules of the Exchange, brokers on sales of this description do not name any principal, and if the vendor is not prepared to complete his contract, the purchaser buys the requisite number of shares, and the vendor is bound to make up the loss resulting from a difference in prices. The broker paid such difference, being unable to complete his contract, and the purchaser made good the shares at a loss. The Court held that a person who employs a broker must be supposed to give him authority to act as other brokers do, and it makes no difference whether or not he himself is acquainted with the rules by which brokers are governed.[1] In the two cases of Mitchell *v.* Newhall,[2] and Bayliffe *v.* Butterworth,[3] involving questions of a similar character, the ruling of Sutton *v.* Tatham was followed.

Some ten years later, Bayley *v.* Wilkins[4] arose; here defendant wrote to plaintiffs to purchase for him twenty shares in a company, which he had seen advertised, at 30 s. discount. Plaintiffs did so, and reported the purchase to him by letter. At the time when the shares were sold, a call of 2 l. per share had been made, which was payable on the 12th of April. On March 31st, one day after the sale of the shares, the transferor paid the call, amounting to 40 l. A few days later transferor's broker applied to plaintiffs for the amount of the call; the plaintiffs accord-

[1] Sutton *v.* Tatham, 37 E. C. L. R. 25.

[2] 15 M. & W. 308.

[3] 17 L. J. Ex. 78.

[4] 18 L. J. C. P. 273.

ingly wrote to defendant, asking for a remittance of the amount. Defendant took no notice of this letter, and plaintiffs renewed the application. Plaintiffs, after waiting several days, paid the call, pursuant of a rule of the Stock Exchange, which directs that if a call has been made on registered shares, the seller is authorized to pay the same, though not due, and claim the amount of the purchaser. Non-compliance with this rule subjects a member to expulsion. April 17th defendant wrote to plaintiff stating that he had sold the shares to one Williams, and that he would try to get him to pay, suggesting, however, that plaintiffs should get back the money, because it was irregular to pay calls when shares were on the market. On the 19th plaintiffs wrote to the defendant, calling his attention to the rule of the Stock Exchange. Defendant not having paid the money, plaintiffs brought suit for its recovery. That a distinction exists between this case and Sutton *v.* Tatham is obvious. In the latter the contract was executory; in this case it was executed. Nor had the former any connection with calls, and the liabilities arising therefrom. The Court, however, was unanimous in affirming the right of plaintiffs to recover, Coltman, J., remarking in a concurring opinion that he saw no reason for doubting that a person who goes into the Stock Exchange to buy railway or other stock, must be taken to have a knowledge of the usual course of business there.

In Westropp *v.* Solomon,[1] a different rule was ap-

[1] 8 C. B. 345.

parently laid down, but this decision is to be explained by the fact that the resolution of the Stock Exchange Committee, which was held not to be binding upon a non-member, was one which had been passed after the employment of the broker had commenced.

In Coles *v.* Bristowe,[1] another step was taken. In that case the names of the proposed transferees had been given up by the jobbers (the defendants), but the transfers had not been executed, and the plaintiff's name still remained on the registry of the company, and appeared on the list of the contributors. He was therefore obliged to pay calls, which amounted to several thousand pounds. For this sum the plaintiff brought an action against the jobbers. It was alleged on behalf of the plaintiff that he told his brokers that he insisted on his right to keep the defendants to their contract, and directed them to complete the same with defendants directly, and to receive the purchase-money from them, and from no other person. Under this state of facts, the law was declared by the Lord Chancellor to be, that no private instructions given to the plaintiff's broker could limit the general authority which by employing them to sell on the Stock Exchange, he gave them to sell according to the usage of the Exchange, and hence that the general custom of the Exchange must furnish the rule by which the contract of the parties was to be interpreted, and their rights determined.[2]

[1] L. R. 4, Ch. 3, Ap.

[2] See also Grissell *v.* Bristowe, L. R. 4 C. P. 36.

Hodgkinson *v.* Kelly,[1] presented some points of interest. On April 28th, 1866, defendant instructed his broker to buy for him fifteen shares in Overend, Gurney & Co., Limited, which the broker did, from a jobber, for the next settling day, which was May 15th.

On the 10th day of May the company stopped payment, and the following day a petition to wind up the same was presented. May 14th plaintiff instructed his broker to sell fifteen shares which he then held in the company, which was done to a jobber, and on the next settling day, through the intervention of several jobbers the name of the defendant was given to the plaintiff, as the purchaser of his shares, according to the Stock Exchange rules. Plaintiff received the money, and executed the transfer to the defendant, who received it, but took no steps to execute or complete it. June 11th a resolution was adopted to wind up the company voluntarily, and on July 3d an order was made to continue the winding up, under the supervision of the Court. The plaintiff had to pay calls, and this was a suit for indemnity for past and future calls. The Master of the Rolls said: "When a man buys or sells shares through his broker on the Stock Exchange, he enters into an implied contract to sell or buy according to the customs and usages prevalent in that body. The question is, what is the nature of a contract which a man enters into when he directs shares to be bought or sold through the instrumentality of the Stock Exchange. The answer, in my opinion, is a very

[1] L. J. 37 Ch. 837.

plain and obvious one. He undertakes to buy and sell according to the practice and usage of the Stock Exchange, assuming, of course, such practice and usage not to be illegal."

In 1871 an interesting case was decided by the Court of Exchequer Chamber in which the nature of Stock Exchange usage was thoroughly discussed and explained. The case is that of Maxted *v.* Paine.[1] There the plaintiff, through his brokers on the Stock Exchange, sold to the defendant, who was a jobber, ten shares of Overend, Gurney stock. On the "name-day" the defendant having received from his brokers the name of one Goss as the ultimate purchaser of the stock, gave up the same to the plaintiff's brokers. No objection was made within the time specified by the rules of the Stock Exchange, and the stock was transferred to Goss. It afterwards turned out that Goss was a mere man of straw, and that the purchase was really made on account of one Sir Samuel Sprye, but that the purchasing brokers and the defendant were ignorant of this arrangement. The transfer was not registered, and calls having been made upon the stock, the plaintiff was compelled to pay them, and was unable to recover them from Goss, who was worthless. He therefore brought this action to recover them from the defendant, but it was held, affirming the judgment of the Court of Exchequer, that the action was not maintainable. The ground of the action was the implied assumption on the part of the first purchaser (the

[1] L. R. 6 Ex. 132.

defendant), to pay calls made subsequent to the purchase, but the defence was set up that according to the rules of the Stock Exchange, the first purchaser (the jobber), was not so liable, if within a certain time he gave up the name of the ultimate purchaser, and that name was not within a specified number of days objected to, and it was claimed that this had been done in the case then under consideration. The Court sustained this defence, and held in substance that when an outside party employs a member of the Stock Exchange to deal for him, he impliedly authorizes the contract to be made according to the rules and customs of the Stock Exchange, and is therefore bound by such rules and customs, no matter whether he was shown to be cognizant of them or not. Even Lush, J., who dissented from the judgment of the Court, acquiesced in the above proposition.

The later case of Duncan *v.* Hill,[1] where the same principle was recognized, is a still stronger authority. There the defendant had directed the plaintiffs, his brokers, to buy various stocks for the account (as it is called) of July 15, 1870, that is, that day was to be the settling-day. On July 13 he desired that the stock should be carried to the next account day, July 29, which was done, and a statement was handed to him showing him liable to a difference of 1688 l. 19 s. On July 18, the plaintiffs were declared defaulters, and all their accounts were, by the rules of

[1] L. R. 6 Ex. 255.

the Stock Exchange, closed, as of that date. The result was a difference against the defendant of 6013 l. 13 s. 5 d., for which the plaintiffs brought this action, and they were held to be entitled to recover. An exhaustive opinion was delivered by Kelly, C. B., in which Channell and Pigott, B. B., concurred. The Chief Baron held in substance that the general rule laid down by the authorities which have been already noticed, was to be recognized, viz.: "That the usages of the Stock Exchange, if not unreasonable, are imported and incorporated into all contracts entered into by any of the public for the purchase or sale of stocks or shares, upon the Stock Exchange, and through the medium of brokers or jobbers, members of the Exchange, and themselves bound by these usages." The learned judge further went on to say that "the particular usage sought to be enforced, namely, that upon a member of the Stock Exchange becoming unable to meet his engagements, he may be publicly declared a defaulter, and official assignees may be appointed to investigate and wind up the contracts into which he has entered, and to close his transactions at the price current in the market on the day before he shall have been declared a defaulter, was a reasonable usage." Basing his opinion of its reasonableness upon the advantage which the public enjoys, by reason of the convenience of having, in stock brokers, agents who can command a ready market for the disposal of their stocks, and upon the fact, therefore, that the customer receives as consideration for the liability which he incurs, the con-

venience that a purchase or sale may be effected of the desired amount, and at the desired time, which he would find it impossible to make, except through the medium of a broker, while the broker could not effect the contract at all, but by agreeing that it should be taken to be made in conformity to the rules and usages of the Stock Exchange, and by making himself personally liable for the performance of it, according to those rules and usages.

Counsel for the defendant took the point in the argument that, while it must be admitted that the usages of the Stock Exchange, which govern the ordinary transactions of the sale and purchase of stocks, are incorporated into contracts made with persons who are not members of the Stock Exchange, yet that a defaulting broker had no right to avail himself, as against his principal, of a usage, the object of which was solely to regulate the dealing in the case of defaulters, and to fix their liability to other members of the Exchange with whom they had entered into contracts. The Chief Baron, however, did not think this point well taken, for he held that "the principal must be considered as having become completely identified with the brokers, even to the extent of having his liability regulated by the accidental default of the latter, and of being subject so far as his responsibility under the contract was concerned, to all the rules to which the latter was liable."

The importance of this case must serve as an apology for such a lengthy citation from it. On appeal to the Exchequer Chamber the decision of the Court of

Exchequer, in refusing to reduce the verdict, was reversed, upon the ground that, while a principal who employs a broker undoubtedly authorizes the latter to bind him (the principal) according to the rules and usages of the Stock Exchange, he does not enter into any obligation to be answerable for the liability which has arisen by reason of his agent's insolvency. "It must be admitted," said Justice Blackburn, "that for any loss incurred by the agent, by reason of his having entered into such contracts, according to such rules, unless they be wholly unreasonable, and where the default is without any personal fault of his own, he is entitled to be indemnified by his principal upon an implied contract to that effect. But it is argued that where the agent, as in this case, is subjected to loss, not by reason of his having entered into the contracts into which he was authorized to enter by his principal, but by reason of a default of his own, that is to say, as in this case, by reason of his insolvency, brought on by want of means to meet his other primary obligations, it cannot be said that he has suffered loss by reason of his having entered into the contracts made by him on behalf of his principal; and consequently there is no promise which can be implied on the part of his principal, to indemnify him, and in the present case there certainly was no express promise to this effect. These allegations, both as to fact and law, seem to us to be correct. There was no failure by the defendants in any part of their undertakings; there was no evidence that the insolvency of the plaintiffs was occasioned by

reason of their having entered into the contracts for the defendants; it is consistent with the evidence that the plaintiffs would have become insolvent precisely at the same time as they did if they had not entered into any contract for either of the defendants. The plaintiffs' insolvency was, so far as regards the defendant, entirely the result of their own default. We think there is no implication of law to force upon the defendant an obligation to indemnify the plaintiffs in such a case."[1]

The most recent case upon the subject is that of Nickalls *v.* Merry, which arose in 1875, where the doctrine of Maxted *v.* Paine was reaffirmed. The opinion was delivered by the Lord Chancellor, and Lord Hatherly, in a concurring opinion, took occasion to say that a person employing a broker on the Stock Exchange to sell shares in that market, which has been established for the sale of shares, must be taken to conform to the usages and customs which have been established by the parties in that market as among themselves, for the better conducting of their business, and must be supposed to intend that his shares shall be sold subject to that condition.[2] The following propositions may be considered as fully established by the English authorities:

1. That the usages of the Stock Exchange bind the members of that body and those who contract through

[1] L. R. 8 Ex. 248.

[2] Nickalls *v.* Merry, L. R. 7; English and Irish Ap. Cases, p. 530; Sheppard *v.* Murphy, Jr., R. 2 Eq. 569; Bowring *v.* Shepherd, L. R. 6 Q. B. 309.

members, provided such usages contravene no settled law or public policy. 9 U.S. Rep. ... 241

2. That the principal cannot, by private instructions to his broker, modify his own liability.

3. That while the principal is bound by his broker's contracts he is not liable for all the consequences of his insolvency.

The subject does not as yet, in this country, seem to have evoked much consideration. There are a number of cases which have arisen in which the question arose, how far a stock-broker is bound by the ordinary rules relating to pledges. These will be discussed in a subsequent chapter on pledges, for they embrace different principles from those alluded to in the English authorities just cited.

The only case in which the subject now under consideration is broached in Pennsylvania, is that of Evans *v.* Waln,[1] which came before the Supreme Court of Pennsylvania in 1872. The facts were substantially these: The plaintiffs, being owners of 2033 shares of C. C. & I. C. stock, employed Markoe & Brother, brokers in Philadelphia, to sell them. The stock was sold by the defendants, brokers in New York, through the agency of Frank Wister, another broker in Philadelphia. Wister failed, in debt to the defendants, whilst the proceeds of the sale of the stock were in their hands. In remitting the proceeds they withheld the amount of his indebtedness. The suit

[1] 21 P. F. S. 69.

was brought to recover this amount. The judge below charged the jury that, if they found that the stock sold by the defendants belonged to the plaintiffs, and the ownership was known to the defendants, that the order to sell the stock was given by Col. Wister, that the defendants knew that he was a stock broker, the plaintiffs were entitled to the proceeds of the sale of the stock. The verdict was accordingly for the plaintiffs. Defendants took a writ of error to the Supreme Court, assigning for error *inter alia* the refusal of the court below to hear evidence of a custom among brokers to keep one account of all transactions with the same party. In support of this objection it was argued that, if two persons in a particular business or calling deal together, they deal subject to the particular customs and usages of such business. In support of this doctrine Coles *v.* Bristowe was cited.

The only two points open for discussion were, first, whether the plaintiffs could be bound by a custom of which they were not shown to be cognizant, and, secondly, whether the custom attempted to be proved was good. In support of the first of these propositions Maxted *v.* Paine and Duncan *v.* Hill were cited, and in answering affirmatively the second, it was argued that, as between brokers themselves, the custom to put all these transactions with each other into one account, and to remit or draw for the general balance, is obviously not only a reasonable one, but one which the nature and extent of their transactions renders imperatively necessary. It would be impossible for brokers

to keep with each other as many separate accounts as they have customers for whom they deal, and to exchange the various balances of each individual account. To require them so to do would be tantamount to saying that their business should stop, or at all events be reduced to very limited proportions. If this be so, then the question is whether it is reasonable that the public who employ these brokers should be bound by the customs which the latter have found necessary for carrying on their business. And it was argued that, on the authority of Duncan *v.* Hill, this question must be answered in the affirmative. It was said further, that the custom offered to be proved in this case is certainly quite as reasonable as that in Maxted *v.* Paine, or that in Duncan *v.* Hill. In the one case the principal was obliged to accept as a purchaser an entirely irresponsible man, to whom objection had not been made within the time required by the rules; in the other a purchaser was obliged to pay over four thousand pounds more than he would otherwise have been compelled to pay, in consequence of the defaulting of his brokers, and the application thereupon of the usages of the Stock Exchange requiring contracts to be settled at an earlier day than that at which they were originally to have matured. In answer to this it was said that, assuming that the plaintiffs could be bound by a usage unknown to them, certainly such a rule must be reasonable, and not inconsistent with rules of law. If Col. Wister had taken the plaintiffs' stock and handed it to defendants in payment of his

debt, they knowing to whom it belonged, and the defendants attempted to justify themselves by saying that this was the custom, it would hardly be considered a reasonable one, and there is practically no distinction between the two cases. In the one case Col. Wister is supposed to have been a party to the transaction; in the other, the real one, he knows nothing of it, but the result is the same, the appropriation by the defendants knowingly of the plaintiffs' money to pay Col. Wister's debt.

As between brokers the custom of putting all transactions into one account, and settling only the balances, may be exceedingly convenient to them, and it is argued, from that convenience, that it must be reasonable as between them and their customers; to which it may be replied, that, because it is inconvenient for a principal to pay his broker's debts, therefore the custom is unreasonable.

It was strenuously contended that, if evidence of the custom were not admitted, the business of brokers must stop or be diminished, but if the business can only be carried on upon the terms that the solvent owner of stock must not only pay to the broker who effects the sale a commission for his services, but also such bad debts as he may have contracted, the business had far better cease.

In delivering the opinion of the Supreme Court, Williams, J., said: "There was no error in the directions of the court below. Such a custom, if proved, would have constituted no defense to the plaintiffs' action.

"Admitting its existence, the defendants had no right to credit Wister's account with the proceeds of the stock. He was not the owner of it, and he had no title or claim to its proceeds. The defendants did not receive the stock from him, and they were not bound to account to him for the price for which it was sold. Besides it does not appear that they did credit him with the proceeds, and no offer was made to show that any such credit was given. It is clear then that, whether this custom was known to the plaintiffs or not, this case is not within its operation, and if so, evidence of its existence would not help the defendants, and was therefore rightly rejected. But if the defendants had received the stock from Wister, knowing as they did that it belonged to the plaintiffs, they would have had no right to apply the proceeds arising from its sale to the payment of Wister's indebtedness. If there is a custom among stock brokers, when dealing with others, to appropriate money belonging to the principal to the payment of his broker's indebtedness, the sooner it is abolished the better. *Malus usus est abolendus.* A custom so iniquitous can never obtain the force or sanction of law, and the marvel is that it should be set up as a defence in this action."

This case is very analogous to Sweeting *v.* Pearce,[1] where the plaintiff, a ship-builder in London, employed one W., an insurance broker, to effect a policy upon a ship at Lloyd's, and after the happen-

[1] 97 E. C. L. R. 449.

ing of a loss gave W. the ship's papers, for the purpose of enabling him to adjust the losses with the underwriters. The policy was effected in W.'s name, and he had retained possession of it. An adjustment having taken place, the loss was settled—in accordance with a usage prevailing at Lloyd's, which was found to be generally known to merchants and shipowners, but which the jury found was not known to the plaintiff, who had merely left the policy in W.'s hands for safe keeping—by the underwriter setting off the amount payable by him upon the policy against the balance due to him from the broker for premiums on other policies effected by him. It was held that, although the plaintiff was estopped from denying that the broker had authority to receive the amount due from the underwriter on the policy in money, he was not bound by the usage, and consequently that he was entitled to recover the amount of the policy against the underwriter.

In Shaw *v.* Spencer,[1] the defendant offered to show *inter alia*, 1. That it is a matter of common occurrence for certificates of stock to be issued in the name of some other person as trustee, when in fact there is not any trust. 2. Whether certificates of stock issued to a designated person as trustee, are constantly bought and sold in the stock market, by a simple indorsement of the certificate by the person named as the holder, without inquiry as to the au-

[1] 100 Mass. 382.

thority by which, or to the use or purpose for which the transfer was made. The Supreme Court sustained the refusal of the lower court to admit them, on the ground that if the customs referred to existed, they were bad, and could have no standing in the courts.

In Day *v.* Holmes,[1] the Auditor found that there was a general and well-known usage among stock brokers in Boston, in filling orders for stock deliverable at any time, at buyer's option, within a certain period, with interest, at a sum not exceeding a certain price, to buy the stock for cash, or on a shorter time than ordered, in their own names, not disclosing the names of their principals, and to turn the same, as it is called, or carry it until the maturity of the contract, charging therefor a brokerage in addition to the usual commission for buying, as compensation for the risk of such carrying; that the amount of such extra brokerage differed with the different stocks, and with the length of time for which they were carried; that such usage was well known to persons dealing in stocks of the description in question, but that there was no evidence of actual knowledge by the defendant of such usage.

The Court said: "The usage alleged by the plaintiffs to exist among stockbrokers in Boston cannot avail them. There are many forcible objections to its validity, but a conclusive one is that it is against sound policy and good morals. It authorizes the broker in

[1] 103 Mass. 306.

his discretion to disregard his instructions, and instead of acting solely in the interest of his principal, to speculate upon the transaction for his own benefit. It creates in the agent an interest adverse to his principal, and is inconsistent with his duty and the obligations which the law imposes upon him when he enters into the contract of agency. Such a usage, unknown to the principal, cannot be supported."

These it will be observed were all instances of bad customs. From the very meagre discussion of this subject upon this side of the water it would be unsafe to hazard an opinion as to the leaning of the courts. It has been thought best, therefore, to review the cases at some length, and let them speak for themselves. The subject is one which is likely to arise at any time, and in that event the English decisions cannot fail to have great weight with the American courts.

CHAPTER III.

METHOD OF TRANSFER. BLANK POWERS.

We have seen that stock is a species of incorporeal property, a chose in action; it follows, therefore, that any delivery of shares must be symbolic in its nature. Hence the necessity of having something tangible by which to show title to shares; for this purpose certificates are used, which represent the holder as entitled to a certain number of them.

Certificates of stock are always to be regarded as *prima facie* evidence of title in the holder for the number of shares named therein, which correspond with a record upon the books of the corporation. They are not conclusive evidence, as will be presently shown. Suppose now that the owner of shares is desirous of parting with his property in them; what action must he take to effect a transfer? The most convenient method of procedure would seem to be to make some memorandum upon the back of the certificate stating that he had disposed of his shares to a certain vendee, naming him, and requesting the proper officers of the corporation to substitute the name of the vendee for his own upon the books of the corporation, and issue to the vendee a new certificate.

When, however, we consider the enormous transactions of the stock market, and the vast number of shares constantly changing ownership, it is evident that much inconvenience would ensue if every vendor

of stock should be compelled to go through this rather tedious operation, and more especially is this the case when it is borne in mind, that by reason of buying and selling through a broker, the vendor is in a great majority of cases entirely ignorant of the vendee's name. Upon the plea of commercial necessity, courts in this country have been induced to countenance the transfer of title to stock by what is known as the blank power of attorney system—assuming of course that the transaction is *bona fide*, and for a valuable consideration.

A blank assignment and power of attorney is endorsed upon the certificate, which the vendor signs and seals leaving a space for the name of the vendee; he then delivers the certificate to his broker, who inserts the vendee's name so soon as a purchaser is found. Upon presentation of the certificate in this form, the corporation will make the necessary transfer, and issue a new certificate to the vendee, who then becomes entitled to all the rights and privileges possessed by the former owner. The charter of a corporation or its rules may provide any reasonable method of transfer, but the method here alluded to is that in vogue among the majority of large corporations in this country.[1] This instrument of transfer is usually under seal, which, theoretically at least, renders it more solemn than if it were merely signed.

[1] State *v.* Bank, 10 Ohio 91; Brightwell *v.* Mallory, 10 Yerger (Tenn.) 196. Sargent *v.* Franklin Ins. Co., 8 Pick. 90.

It is proposed now to consider the steps by which the American Courts have been led to affirm the validity of blank powers of attorney, first of all, however, stopping to review some of the English decisions upon the same question. It may fairly be assumed as a well established doctrine of common law, that when an instrument is signed and sealed, or perhaps only sealed, it is a finished and complete legal instrument, and no man may alter it save at his peril, not even to the filling up of a blank unless the power so to alter has been conferred by an authority of equal solemnity with the instrument which it is proposed to change. It may also be assumed that an obligation under seal, executed with the name of the obligee in blank, is wholly void.

Very quaintly is this doctrine expressed in a little treatise on the Laws of England, by Perkins, written probably in the time of Henry VIII, where the author says: "If a common person seal an obligation or any other deed without any writing in it, and deliver the same unto a stranger, man or woman, it is nothing worth, notwithstanding that the stranger make it to be written, that he who sealed and delivered the same unto him is bounden unto him in twenty pounds. For in an action of debt brought upon this obligation, he may plead that it is not his deed: *causa patet.* The same law is of other deeds *mutatis mutandis.*"[1]

Almost, if not actually, the first successful attempt to

[1] Perkins, Par. 118; Sheppard's Touchstone 54; Pigot's Case, 11 Coke 27.

overturn this well-established principle occurred in a case before Lord Mansfield, the facts of which were these: Defendant wanted to borrow four hundred pounds, or so much of it as his credit would raise. For this purpose he executed a bond, with blanks for the name and sum, and sent an agent to raise money on the bond. Plaintiff lent two hundred pounds, and the agent accordingly filled up the blanks with that sum and the plaintiff's name, and delivered the bond to him. On *non est factum* pleaded, Lord Mansfield held it a good deed, upon the ground that the agent was the attorney authorized by defendant to fill up the bond.[1]

No opinion by Lord Mansfield in this important case is on record, and the course of reasoning by which he arrived at his conclusions is consequently inaccessible. Mr. Preston in his edition of Sheppard's Touchstone, questions whether it can be law, "for it assumes that there could be an attorney without deed."[2] This case seems to stand alone; others have sometimes been cited in connection with it as establishing a similar doctrine, but a careful examination of them cannot fail to show very cleary that they involved other points than were embraced in Texira *v.* Evans.[3] For a very long period this case was a stumbling block in the way of

[1] Texira *v.* Evans, cited in Master *v.* Miller, 4 T. R. 320.

[2] Sheppard's Touchstone 69.

[3] Zouch *v.* Clay, 2 Levinz 35; Paggett *v.* Paggett, 2 Cas. in Ch. 410, 487; Master *v.* Miller, Supra; England v. Roper, 1 Starkie 242; Lewis *v.* Bingham, 4 B. & Ald. 672; Hudson *v.* Revett, 5 Bing. 368.

English judges; it rested on the authority of Lord Mansfield, which was not to be questioned unadvisedly, yet on the other hand, there existed no report of it, and as has just been said, his reasons for reaching such a conclusion were unattainable.

Finally Baron Parke decided that Texira *v.* Evans was not law in Hibblewhite *v.* McMorine.[1] That case was as follows: The Brighton Railway Act requires the conveyance of shares to be by writing, duly stamped and to be under the hands and seals of both parties. The clause afterwards calls the instrument a "deed or conveyance," and a "deed of sale or transfer." The question arose first as to whether this conveyance must, in order to satisfy the statute, be by deed, and secondly, if this be answered in the affirmative, whether an instrument of transfer of shares, executed by the proprietor of such shares, with the name of the purchaser in blank, and handed over by him to the plaintiff, by whom on the sale of such shares to the defendant, the defendant's name was inserted as the purchaser, was valid or void. Baron Parke, in delivering the opinion of the Court, said *inter alia*, "Assuming then the instrument to be a deed, it was wholly improper if the name of the vendee was left out, and to allow it to be afterwards filled up by an agent appointed by parol, and then delivered in the absence of the principal as a deed, would be a violation of the principle that an attorney to execute and deliver a deed for another must

[1] 6 M. & W. 200.

himself be appointed by deed." The only case cited in favor of the validity of a deed in blank afterwards filled in, is that of Texira *v.* Evans. But this case, the Baron thinks, cannot be considered law. On the other hand there are several authorities that an instrument which has a blank in it, which prevents it from having any operation when it is sealed and delivered, cannot become a valid deed by being afterwards filled up. Concluding, he said: "There is no authority that shows that an instrument which, when executed, is incapable of having any operation, and is no deed, can afterward become a deed, by being completed and delivered by a stranger, in the absence of the party who executed it, and unauthorized by instrument under seal." This decision of Baron Parke was unanimously affirmed in Enthoven *v.* Hoyle,[1] and Humble *v.* Langston.[2]

There was a case in the Exchequer in 1843, which was supposed to conflict with Hibblewhite *v.* McMorine; there is no conflict, however, for the only point decided in the case referred to, was that the insertion of the Christian name of the attorney in the absence of the principal, did not vitiate a complete and operative power of attorney. The instrument was good without the addition and was not affected by it.[3]

In 1862 another case arose in England of great importance, the facts of which were these: Plaintiff was the owner of numerous securities, and in all his transactions in connection therewith, employed one Oliver,

[1] 13 C. B. 373.
[2] 7 M. & W. 517.
[3] Eagleton *v.* Gutteridge, 11 M. & W. 465.

a broker, who kept plaintiff's certificates and other papers for him in his (Oliver's) safe at a London bank. Upon one occasion plaintiff desiring to dispose of some of his securities, Oliver informed him that for the purpose of transferring the shares to the purchaser thereof, it would be necessary for him to execute ten deeds of transfer. Believing this statement to be true, plaintiff acted accordingly, and delivered to Oliver signed and sealed ten forms of transfer, to be afterwards filled up by Oliver. All of these forms were in blank, and after delivery to Oliver were never again seen by plaintiff. Among the securities held by plaintiff were one thousand shares of stock in defendant's railroad. Instead of using the ten deeds as directed, Oliver used only two, in each of which he inserted the number five hundred in defendant's company, and the name of a confederate as transferee, besides forging the name of one Bourne as a subscribing witness. The railroad company, upon the faith of these deeds, transferred the shares to the transferee therein named, having first notified the plaintiff, as was customary, of their intention so to do, unless they heard from him to the contrary. All plaintiff's letters being sent by his order to Oliver's care, it is needless to say that this one never came to his hands. The company having made the transfer, plaintiff brought this action against them. The case was ably argued upon both sides, but the Court said that an instrument under seal, executed by the plaintiff, with blanks afterwards filled in by a parol agent, was void; and although in this case the plaintiff

had in various ways been guilty of the grossest negligence, he was held not to be estopped by his voluntary delivery of a blank deed, from bringing the action in question.[1]

Shares in English companies are legally transferable in different ways: some by deed only, some by writing not under seal, some by parol.

It by no means follows, therefore, from the cases cited, that all blank transfers are worthless. Blank powers are not unusual on the English Stock Exchange. There are shares, *e. g.*, shares in cost book mining companies, which are transferable without the intervention of any formal document; and a letter signed by a shareholder, transferring his shares to ———, amounts, if delivered to a purchaser, to a transfer to him, and authorizes him to fill up the blank with any name he likes.[2]

It remains now to consider the law in this country upon the subject; upon the general doctrine of blanks the law in the different States is not at all uniform. A recent writer, in speaking of this very subject remarks, that a majority of the States incline to the common-law rule, but a large minority reject it, some altogether, some to a qualified extent, as the cases before them demanded. Hesitating between the mischiefs that might ensue from too bold an innovation upon the common-law rule and the evident injustice of allowing obligors to escape from the consequences of

[1] Swan *v.* The N. B. A. Co., Jurist, Vol. VIII, N. S. 940.

[2] Walker *v.* Bartlett, 18 C. B. 845.

their acts, the courts in those States which reject the strict doctrine have departed from it only so far as was necessary in the premises.

Distinctions have been taken between a bond and a conveyance; between a piece of blank paper, signed and sealed, and a bond or deed in which some essential part was wanting; between express authority and implied authority; between authority to fill in a given name or a fixed sum, and authority to insert the name of whomsoever, for an amount to be determined by the agent. Nor have the decisions in individual States been consistent; the fluctuations of judicial opinion, as evinced in the number of cases doubted and overruled is very noticeable.[1]

The following States adhere to the strict rule of the common law: Arkansas,[2] Illinois,[3] Georgia,[4] Kentucky,[5] Massachusetts,[6] Mississippi,[7] North Carolina,[8] Tennessee,[9] Virginia,[10] and California.[11] The States of Ohio,[12] Maryland,[13] Delaware,[14] Iowa,[15] Connecticut,[16] New Jersey,[17] Maine,[18] Alabama,[19] and Louisiana[20] strongly incline toward the doctrine of Texira *v.* Evans. The

[1] Am. Law Register, vol. xii, N. S., p. 699.

[2] Cross *v.* Bank, 5 Pike, 525.

[3] People *v.* Organ, 27 Ill. 27.

[4] Ingram *v.* Little, 11 Geo. 174.

[5] Cummins *v.* Cassily, 5 B. Munroe, 74.

[6] Burns *v.* Lynde, 6 Allen, 305.

[7] Williams *v.* Crutcher, 5 Howard, 71.

[8] Graham *v.* Holt, 3 Iredell "Law," 300.

[9] Mosby *v.* State, 4 Sneed, 324.

[10] Preston *v.* Hull, 23 Grattan, 600.

[11] Upton *v.* Archer, 41 Cal. 85.

[12] Ayres *v.* Harness, 1 Ohio, 368.

[13] Byers *v.* McClanahan, 6 G. & J. 250.

[14] Clendaniel *v.* Hastings, 5 Harr. 408.

[15] Owen *v* Perry, 25 Iowa, 412.

[16] Bank *v.* Railroad, 30 Conn. 231.

[17] Bank *v.* Hall, 2 Green, 383.

[18] South Berwick *v.* Huntress, 53 Maine, 89.

[19] Gibbs *v.* Frost, 4 Ala. N. S. 720.

[20] Chalaron *v.* McFarlane, 9 La. 227.

courts in South Carolina unreservedly sustain it;[1] in one case, however, they admitted that a blank piece of paper signed and sealed is utterly nugatory.[2] In New York[3] and Pennsylvania[4] the decisions are conflicting, while in Indiana and Texas, seals being abolished by statute, the common-law rule is virtually of no effect. The United States Supreme Court leans rather in the direction of Texira *v.* Evans. Speake *v.* United States settled that an express parol authority to alter a sealed instrument could be shown;[5] but in a subsequent case Chief Justice Marshall decides, "with much doubt," that no implied authority will be sufficient.[6] In 1864 this court said, "although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is that the power is sufficient."[7]

All the cases, however, agree that, if the blank in the instrument under seal be filled up in the presence of the maker thereof, and with his consent, it will be binding upon him, the agent in that case being merely looked upon as an amanuensis, to put on paper whatever may be dictated to him by the maker of the instrument. So much then for a cursory view of the American law relating to the filling up of blanks in

[1] Gourdin *v.* Commander, 6 Rich. 497. [2] Duncan *v.* Hodges, 4 McC. 239.
[3] Ex parte Kerwin, 8 Cow. 118; Hanford *v.* McNair, 9 Wend. 54.
[4] Wiley *v.* Moor, 17 S. & R. 438; Arrison *v.* Harmstead, 2 Barr. 194
[5] 9 Cranch, 28. [6] United States *v.* Nelson, 2 Brock, 64.
[7] Drury *v.* Foster, 2 Wallace, 33.

instruments under seal. As was remarked above, the decisions are conflicting, and few States are willing to go as far as Texira *v.* Evans.

It was stated at the beginning of this chapter that the courts on this side of the Atlantic uniformly recognized the validity of blank powers of attorney for the transfer of shares of stock, in direct contradistinction to the English law upon the same subject; and it was also intimated that the courts had been brought to sanction this departure from the old common-law rule, upon the plea of commercial necessity. We come, therefore, to consider some of the American decisions upon this point. There can be no doubt whatever that a power of attorney, signed and sealed, is a deed, a finished legal instrument,[1] and the sealing is necessary to the validity of the instrument, so far as any use to which it can be put to effect a transfer of stock is concerned, for the rule of a vast majority, if not all corporations, requires the power to be under seal, as a mark of solemnity; so that the sealing is not a mere work of supererogation, as has been frequently alleged. It was this mistake which induced a writer in a recent legal periodical to fall into the error of citing a leading New York case, wherein it is held that, "if the instrument executed by the agent derives its validity merely from the seal, it is void, but if good without seal, it is binding as a parol contract," as proving that the law relating to blank powers is entirely independent of any

[1] Denny *v.* Lyon, 2 Wright, Pa. 98.

law affecting blanks in sealed instruments; a seal is as necessary to a power of attorney for a stock transfer as it is to a bond. The New York case related to the delivery of a deed as an escrow, and had no possible connection with stock certificates, nor could any construction, however forced, which might be laid upon it, suggest the slightest analogy between them.[1] It is a matter of common notoriety that in the United States Custom Houses the issuing of blank bonds is of daily occurrence, and their validity has never been questioned.

But to return to blank powers of attorney. It is hardly necessary to state that, in a *bona fide* stock transaction, where a holder of certificates, being also the registered owner of the shares, desires to dispose of them, and deposits them with his broker, who finds a purchaser for them, fills up the blanks, which the holder has left for the name of the transferee, causes the necessary changes to be made upon the books of the corporation, and returns the purchase-money less his commission to the transferor, out of such a transaction as this, we say, no difficulty would be likely to arise; the transferee is satisfied because he receives the stock which he desired, the transferor is satisfied because he has disposed of his stock and received his price for it, and the broker is also satisfied, because, having acted as middleman, he has received his commissions.

[1] Worrall *v.* Munn, 1 Selden, 239.

All the trouble which has arisen upon the subject has been in cases where fraud was alleged, and especially in those instances, so numerous of late years, where stock is pledged as collateral security for debts, the debts are not paid, the stock is sold to satisfy the pledgee, and then it is that the debtor seeks to recover his securities, and questions arise as to the validity of blank powers under seal; this is cited merely as an example, all kinds of cases having arisen, just in proportion to the different transactions in which stock certificates have been used for lawful or unlawful purposes. In the brief limits of this essay it will be impossible to do more than select a few of the leading cases in States where stock transactions are more common than in others, and try to gather from these the general principles of law which apply to the subject in hand. The leading New York case is undoubtedly that of Kortright *v.* Buffalo Bank.[1] This case has been extensively quoted and misquoted for the past forty years. The facts were, briefly: Barker was the owner of a large number of shares of stock in the Commercial Bank of Buffalo, transferable only upon the books of the bank by Barker, or his attorney, upon surrender of the certificates. He sent his certificate, together with his promissory note for $10,000, as collateral security to one Bartow, who was at that time cashier of the Commercial Bank of Albany, to obtain a loan of $10,000. Before transmitting he signed the

[1] 20 Wendell, 91; S. C. 22 Wendell, 348.

power in blank, to which he attached a seal. About a year afterward Bartow's agent negotiated the certificate, by delivering it to plaintiff, from whom he received a large loan. Plaintiff gave a receipt for the certificate, promising to return it so soon as the money borrowed should be refunded. Upon the day that plaintiff advanced the money Bartow absconded. Plaintiff accordingly filled up the blank transfer by inserting his own name, and constituting one Sherwood, his attorney, to perfect the transfer. The Buffalo Bank refused to allow the transfer. Plaintiff accordingly brought an action of assumpsit against the Buffalo Bank for the refusal. The verdict was for the plaintiff, and in denying a motion made by defendants for a new trial, Chief Justice Nelson used the following language: "It is contended that the assignment on the back of the certificate of stock from Barker to plaintiff, and the power of attorney to Sherwood, were made without proper authority, and therefore the demand upon the bank to enter the transfer upon the books was nugatory. The case presents a complete answer to this view. It appears that Barker indorsed his name, and affixed his seal upon the back of the scrip, which was duly witnessed before it was inclosed to Bartow to obtain the $10,000. This blank was afterwards filled up by the plaintiff by writing over the signature the transfer directly to himself, and the power of attorney to Sherwood, all of which is in strict conformity with the universal usage of dealers in the negotiation and transfer of stocks, according to the

proof at the trial. Even without the aid of this usage there could be no great difficulty in upholding the assignment; the execution in blank must have been for the express purpose of enabling the holder, whoever he might be, to fill it up. If intended to have been filled up in the name of the first transferee there would have been no necessity of its execution in blank; Barker might have completed the instrument. The usage, however, is well established, and was fully understood by Barker, as he made the transfer in conformity to it, and he or those setting up a claim under him, should not now be permitted to deny its validity. The filling up is but the execution of an authority clearly conveyed to the holder, is lawful in itself, and convenient to all parties, as it avoids the necessity of needlessly multiplying transfers upon the books."

The case was removed to the Court of Errors, where Senator Verplanck read a most exhaustive opinion. He acceded to the fact that evidence had been given that this system of blank power transfer was, and had been for years, the customary mode of transferring stock in New York, and that while such a custom could not vary the law if it pronounced a deed or other sealed instrument to be void, when executed in this manner, the evidence of custom is good not to contradict or change the law, but to explain the meaning and intent of the parties. He went on to say that, while such might have been the law in ancient times, when we come down to a state of society like our own we shall find the more rational doctrine well established.

These two opinions are law in New York to-day, but it is only proper to remark that, when they were delivered, in 1839, Hibblewhite *v.* McMorine had not arisen, so that the court was not in error in assuming that Texira *v.* Evans was recognized as law in England. Many other important points were discussed and definitely settled in this New York case, which will be noted in a subsequent section. It will thus be observed that the plea of commercial necessity was early recognized by the New York courts, and has been affirmed in numerous cases since, so that the law in that State upon blank powers is no longer open to question.

The leading Pennsylvania case is that of Denny *v.* Lyon,[1] and the facts are interesting. Here the plaintiff had given to her son a certificate of stock, with blank power, to enable him to raise money to carry on his business, with the distinct understanding that it was to be pledged, as collateral security for a debt, to certain specific pledgees. This was done, the debt was paid, and the stock returned to her son, who then erased the name of the last pledgee, and inserted that of another person of whom he desired to borrow money, and to him he pledged the certificate as collateral. He did this several times, until finally it came into the hands of one Denny, who was young Lyon's creditor to a large amount. Failing to discharge his debt to him, Denny was about proceeding to effect a transfer of the shares to his own name, when

[1] 2 Wright, Pa. 98.

the plaintiff, who was the original owner of the stock, prayed for an injunction to restrain him from so doing. The court below granted the injunction, from which decision the defendant appealed to the Supreme Court, which, in affirming the decision of the court below, said: "The cashier of the bank swears that the name of the transferee is usually not inserted in the power of attorney, and that it is more convenient not to have it inserted. We know that this is commercial usage; it was probably originated by the banks, if not, they have countenanced it, and thus brought people to practice it, and yet it is a vicious usage, which no considerations of convenience are sufficient to justify. *Malus usus abolendus est.* A power of attorney, signed, generally sealed, and duly delivered, what is it but a finished legal instrument? Who may alter that paper writing to the prejudice of another, without incurring liability to the charge of forgery? If commercial usage permits the insertion, erasure, and subsequent reinsertion here, what other legal instrument may not commercial usage tamper with in like manner?" The court affirmed the decision of the lower court "without intending a precedent."

Pennsylvania did not at that time seem disposed to go as far as New York had gone. Later, however, the Supreme Court advanced a step, and said that provided the transaction was for a valuable consideration, they could see no objection to the power being in blank.[1] This is now law in this State, and may be

[1] Building Assoc. *v.* Sendmeyer, 50 Penna. 67.

summed up as follows: A certificate of stock is transferable by a blank indorsement, which may be filled up by the holder by writing an assignment and power of attorney over the signature indorsed.[1] The law in Massachusetts is seen by the recent case of Day *v.* Holmes,[2] where the same principle is recognized. In addition it may be stated, in the nature of a corollary to the above, that no person who sells stock and receives consideration therefor, and gives a power of attorney for the transfer, will be allowed in equity to defeat the rights acquired by the transfer, by alleging an insufficiency of the instrument by which the transfer was made.[3]

We have thus reviewed the more prominent decisions, both in England and the United States, upon this point, and, as was indicated at the outset, they are found to be diametrically opposed. That our courts have been actuated by different motives in lending legal sanction to what the commercial world demanded, upon the plea of necessity, is very evident from the Pennsylvania and New York cases cited above; the same goal has, however, been reached by different roads.

Since this departure from ancient law and custom was originated by corporations for their own convenience, it is but equitable that, when a transfer is made

[1] Angell & Ames on Corporations, 7th Ed., Par. 564.

[2] 103 Mass. 306.

[3] Chew *v.* Bank of Baltimore, 14 Md. 299.

in this manner, the corporation should run all risks connected therewith, if forged, or made by *femes covert*, or infants. This must be so because the law declares that forged instruments are void, that married women are not *sui juris*, and that infants are incapable of contracting except in specified cases. In all these instances there may be no actual fault on the part of the corporation, but the legal conclusion results from the justice and expediency in such transactions of casting the loss on those who can best provide against it.

It is moreover the undoubted right of a corporation to refuse to recognize a power of attorney unless thoroughly convinced of its genuineness, and it has perfect authority to refuse to make any transfer unless the owner of the stock is present to sanction the transaction.[1] * Indeed the courts have gone further, and held that a corporation is not justified in transferring stock on its books upon a power of attorney

[1] Chew *v.* Bank, 14 Md. 298; Bayard *v.* Farmers and Mechanics' Bank, 2 P. F. S. 232.

* The decision in Bayard *v.* Bank led to the passage of the following statute by the Pennsylvania Legislature: "All certificates of stock and loans which have been or may hereafter be issued by this commonwealth, or by any municipal or other corporation, shall be transferable by the legal owner thereof, without any liability on the part of the transfer agents of the commonwealth or the municipal or other corporation permitting such transfers, to recognize or see to the execution of any trust, whether expressed, implied, or constructive, to which such stocks or loans may be subject, unless when such transfer agents of the commonwealth, or officers of such municipal or other corporation, charged with the duty of permitting such transfer to be made, shall have previously received actual notice in writing, signed by or on behalf of the person or persons for whom such stocks or loans appear, by the certificate thereof, to be held in trust, that the proposed transfer would be a violation of such trust." Act 23d May, 1874, Purdon, 1942.

signed many years previous, without making due inquiry as to whether the power has since been revoked.[1]

In summing up this section, the words of a Connecticut judge seem exceedingly *apropos*, as reflecting the general sentiment of the legal and commercial world. Speaking of blank powers, he says: "No reason can be assigned which is founded in good sense, and is not entirely technical, why a blank in an instrument under seal may not be filled up by the party receiving it, after it is executed, as well as any other contract in writing, where the parties have so agreed at the time. In either case the contract, when the blank has been filled, expresses the exact agreement of the parties, and nothing but an extreme technical view, derived from the ancient law of England, can justify the making of any distinction between them. Such a distinction is little suited to the usages and necessities of modern commerce, for credit among merchants and facilities for making it available in their transactions are a most important element in its character, however unimportant they may have been in a state of society where commerce was little known, where seals were a substitute for signatures, and where lords and vassals alike could not write their own names."[2]

[1] Athenæum Life Co. *v.* Pooley, 3 De G. & J. 294; Penna. R. R. Co.'s Appeal, 5 Weekly Notes, 22.

[2] Bridgeport Bank *v.* N. Y. & N. H. R. R. Co., 30 Conn. 274.

CHAPTER IV.

NEGOTIABILITY OF STOCK CERTIFICATES.

VERY closely allied with the subject treated of in the last section, is that of the negotiability of stock certificates. Are they governed and regulated by the same law as bills of exchange, promissory notes, etc.? Before entering upon the consideration of this interesting, but intricate question, it may be well to advert for a moment to the general doctrine of negotiability.

At common law the rule was, that no one could give to another a better title to property of any kind, than he himself had, or as the maxim has it, *Nemo dat quod non habet.* There was one, and perhaps only one, exception to this rule, viz., sales in market overt, but the law of market overt was never of much importance in this country.[1] In England it has lost much of its force since the passage of 24 and 25 Vic. c. 96, sec. 100.

There was, therefore, at common law, no such thing as negotiability, but by the law merchant, bills of exchange were negotiable. The law merchant is of comparatively recent origin. It consists simply of the usages of merchants and traders, ratified by the decisions of courts of law, which upon these usages being proved to them have adopted them as settled law,

[1] Towne *v.* Collins, 14 Mass. 499; Ventress *v.* Smith, 10 Peters, 176; Robinson *v* Skipworth, 23 Ind. 311; Easton *v.* Worthington, 5 S. & R. 129; Hoffman *v.* Carow, 22 Wendell, 285; Griffith *v.* Fowler, 18 Vt. 390; Roland *v.* Gundy, 5 Ohio, 202; Browing *v.* Magill, 2 H. & J. 308; Barnard *v.* Campbell, 10 Sickels, 456.

with a view to the interests of trade and the public convenience. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon or incorporated into the common law, and may thus be said to form a part of it. "When a general usage has been judicially ascertained and established," says Lord Campbell, "it becomes a part of the law merchant, which courts of justice are bound to know and recognize." [1]

It by no means follows, however, that an instrument is negotiable because there is a custom of trade to pass it by delivery without a concomitant right of action accruing to the transferee. Such custom cannot constitute negotiability; nor is it competent for private parties to confer such, for the law does not enable any man, by a written engagement, to give a floating right of action at the suit of any one into whose hands the writing may come, and who may thus acquire a right of action better than the right of him under whom he derives title.[2]

If a custom to treat an instrument as negotiable can be proved to form part of the law merchant, then the instrument is *ipso facto* negotiable, but no custom which is in contravention of a statute, or of very recent origin, can be part of the law merchant, even though it obtain generally among merchants.[3]

[1] Brandao *v.* Barnett, 12 Cl. & F. 805.

[2] Dixon *v.* Bovill, 3 MacQ. Sc. Ap. 1.

[3] Merchant Banking Company of London *v.* Phœnix Bessemer Steel Co., L. R. 5 Ch. D. 205; Crouch *v.* Credit Foncier, of England, L. R. 8 Q. B. 374.

Promissory notes were declared negotiable by 3 and 4 Anne. Whether this statute was declaratory or not seems involved in considerable doubt. "It is not," says Daniel in his work on Negotiable Instruments, "at this time, a question of much practical importance, whether at common law promissory notes were negotiable or not, though occasionally the point is presented in States where the statute law upon the subject fixes other criteria of negotiability than those established by the statute of Anne."[1]

In the recent case of Goodwin *v.* Robarts,[2] Cockburn, C. J., decidedly inclines to the opinion that the statute was declaratory. He says, "Thus far the practice of merchants, traders and others of treating promissory notes, whether payable to order or bearer, on the same footing as bills of exchange, had received the sanction of the courts, but Holt having become Chief Justice, a somewhat unseemly conflict arose between him and the merchants, as to the negotiability of promissory notes, whether payable to order or bearer, the Chief Justice taking, what must now be admitted to have been a narrow-minded view of the matter, setting his face strongly against the negotiability of these instruments, contrary as we are told by authority to the opinion of Westminster Hall, and in a series of successive cases, persisting in holding them not to be negotiable by indorsement or delivery. The statute

[1] Irvin *v.* Maury, 1 Mo. 194; Dunn *v.* Adams, 1 Ala. 527; Caton *v.* Lenox, 5 Rand. 31; Davis *v.* Miller, 14 Grattan 18; Norton *v.* Rose, 2 Wash. Va. 233.

[2] L. R. 10 Exch. 337.

of Anne may indeed, practically speaking, be looked upon as a declaratory statute, confirming the decisions prior to the time of Lord Holt."

The doctrine of negotiability has been in England one of steady growth, and numerous instruments have been classed as negotiable. These include bankers' notes,[1] bills indorsed in blank, which had been deposited with a banker to be received when due,[2] exchequer bills,[3] foreign bonds,[4] cash notes payable to bearer,[5] and in a late case scrip issued in England by the agent of a foreign government, by which the holder is to be entitled on payment in full of the instalments due from him, to delivery by the agent of definite bonds of the foreign government on their arrival in the country.[6]

In this country a disposition has been evinced to extend the class of negotiable instruments, when commercial necessity seemed to demand it. So that now it is well settled that certificates of deposit, when expressed in negotiable words, are negotiable.[7] But the contrary has been held in Pennsylvania,[8] and in Eng-

[1] Miller *v.* Race, 1 Burr 452.

[2] Collins *v.* Martin, 1 B. & P. 648.

[3] Woodey *v.* Pole, 4 B. & Ald. 1.

[4] Gorgier *v.* Mieville, 3 B. & C. 45.

[5] Grant *v.* Vaughan, 3 Burr 1516.

[6] Goodwin *v.* Robarts, L. R. 10 Ex. 337.

[7] Miller *v.* Austen, 13 How. 218; Bank *v.* Farnsworth, 18 Ill. 563; Carey *v.* McDougald, 7 Ga. 84; Pardee *v.* Fish, 60 N. Y. 265.

[8] Patterson *v.* Poindexter, 6 W. & S. 227; Charnley *v.* Dullas, 8 W. & S. 353.

land.[1] And after much litigation the same character has now been decided to belong to coupon bonds, and bonds of State, municipal and other corporations, when expressed in negotiable words,[2] and a score of State decisions. In Diamond *v.* Lawrence Co.[3] the Court, while admitting that all the English and American authorities were against them, held that certain bonds issued by Mercer Co. were not negotiable, but this was reversed in the U. S. Supreme Court.[4] So also bills of credit,[5] and bank checks.[6]

Bills of lading may be classed among *quasi* negotiable instruments, since "they are rather like than of them."[7] But while possession of a bill of lading or other document of like nature may be evidence of title, and in some circumstances and for some purposes equivalent to actual possession of the goods, it does not constitute title, nor of itself affect the operation of the general rule, that property in chattels cannot be transferred except by one having the title or any authority

[1] Sibree *v.* Tripp, 15 M. & W. 23.

[2] White *v.* Vermont & Mass. R. R., 21 Howard 575; Moran *v.* Comm. Miami Co., 2 Black 722; Mercer Co. *v.* Hacket, 1 Wallace 83; Gelpcke *v.* City of Dubuque, 1 Wall. 175; Meyer *v.* Muscatine, 1 Wallace 384; Murray *v.* Lardner, 2 Wall. 110; Thompson *v.* Lee Co., 3 Wall. 327; Supervisors *v.* Schenck, 5 Wall. 772; Aurora City *v.* West, 7 Wall. 82; Commissioners *v.* Clark, 4 Otto 278.

[3] 1 Wr. 353.

[4] Mercer Co. *v.* Hacket, 1 Wall. 83.

[5] Craig *v.* State of Missouri, 4 Peters 411.

[6] Notes to Overton *v.* Tyler, Am. Ldg. Cas. vol. 1, 5th Ed. 407.

[7] Lickbarrow *v.* Mason, 2 Sm. Ldg. Cas. 1157; Berkley *v.* Watling, 7 A. & E. 29; Bell *v.* Moss, 5 Wharton 189; Davenport National Bank *v.* Homeyer, 45 Mo. 145; Barnard *v.* Campbell, 10 Sickels 462.

from the true owner.[1] But a discussion of the subject as relating to bills of lading while interesting, would be aside from the present purpose. It has been stated that negotiability is a creature of commercial necessity, and it is but natural that as commerce and trade develop in all their varied and intricate ramifications, that a great pressure should be brought to bear upon the courts to increase the number of negotiable securities, and it has been entirely in obedience to these demands that the extensions cited have been made. The wisdom of the change, especially in the case of coupon bonds, has been seriously questioned by many distinguished writers, notably the late Judge Redfield.[2] In considering the classes of negotiable instruments we speak entirely independent of any statute. Acts have been passed in several States making various securities negotiable, but any consideration of these would fall outside of the province of an essay of this kind.

We come now to the consideration of stock certificates—are they strictly negotiable, and if not, how far do they partake of the character of negotiable instruments?

It would be needless to enter upon any extended review of the English authorities upon this point, for the doctrine in that country upon cases arising under blank powers, cited in a former chapter, serve as an

[1] Barnard *v.* Campbell, supra.

[2] Note to Matthews *v.* Massachusetts National Bank, 14 Am. Law Reg. N. S. 162.

index to their views upon the matter under discussion. In a recent case, however, the court, after reviewing an immense number of prior decisions, and weighing them with great care in a most elaborate opinion by Justice Blackburn refused to recognize debentures, issued by public corporate companies in the form of negotiable instruments, made payable to bearer, for the purpose of passing current in the market, as entitling the *bona fide* purchaser for value to hold them against the equities of former holders. In this case the debentures were under the seal of the company, and had been stolen from the owner, and purchased in the market as above stated, but the court held that the purchaser could not recover. The conclusion is reached that no such security is negotiable, in any such sense as to exclude the equities of former holders, by a *bona fide* purchase for value; and it is further declared that the custom of the dealers on the Stock Exchange, or of merchants and commercial men generally, to treat such securities as negotiable in the strict sense will not have the effect to make them so, since an express contract on the part of the maker to pay the same to any *bona fide* assignee for value, without regard to the equities of former holders, would be a void contract as to the holders of such equities, and no custom could have a greater effect than an express contract.[1] This case, decided in 1873, may be considered as settling the law in England upon this subject.

[1] Crouch *v.* Credit Foncier of England, Limited, L. R. 8 Q. B. 374.

NOTE.—A debenture is an instrument in writing, generally under seal, creating a definite charge on a definite or indefinite fund or subject of property in favor of

Coming now to the American courts we find scarcely a dozen cases upon the point. We will consider them in their order. The Mechanics Bank *v.* New York and New Haven R. R.[1] was one of the numerous cases arising out of the famous Schuyler frauds. Schuyler was President and Transfer Agent of the New York and New Haven R. R. He issued a certificate for several shares to one Kyle, who pledged it as collateral to the plaintiff. All the stock authorized by the charter had been issued, and Kyle did not take this *bona fide*, but the plaintiff did. Kyle defaulted and plaintiff demanded a transfer. Several important questions arose in this case, but the principal one was as to the negotiability of the certificate, and on this point the court declared itself with no uncertain sound.

The argument of Comstock, J., who delivered the opinion, was substantially, that stock certificates contain no negotiable words, but declare that the person named is entitled to certain shares of stock. They do not run to bearer or order. The corporation declared, both in its by-laws and on the face of its certificates, that shares can be transferred only on the books, and on the surrender of the evidence of the previous own-

a given person, or of a given person and his order or bearer, and constituting a member in a series of similar instruments, each entitling the original holder thereof to similar rights. (Cavanagh's Law of Money Securities, 267.)

It differs (1) from a mortgage, which is an actual transfer of property; (2) from a bond, which does not directly affect property, and (3) from a mere charge on property, which is individualized, and does not form part in a series of similar charges. *In re* Florence Land and Public Works Co. Ex parte Moor, L. R. 10 Ch. D. 530; Moor *v.* Anglo.Italian Bank, L. R. 10 Ch. D. 681.

[1] 3 Kernan 599.

er's title, and that if an illustration were wanting of the value of such a restriction, it would be found in the present case. The court would not say that the restriction prevents the owner of stock from selling his shares by an outside transfer, so that the vendee will acquire in equity his own rights, but to say that the holder of a false and fraudulent certificate by indorsing and delivering it to another person can create a title hostile to the corporation itself, would be to deny to the restriction any meaning or effect whatever. "Looking at the question upon principle," said the court, "I am not aware of anything in the nature or uses of this kind of property which requires an application of the rules which belong to negotiable securities. Stocks are not like bank bills, the immediate representative of money, and intended for circulation. The distinction between a bank bill and a share of bank stock is not difficult to appreciate. Nor are they like notes or bills of exchange, less adapted to circulation, but invented to supply the exigencies of commerce and governed by the peculiar code of commercial law. They are not like Exchequer bills and government securities, which are made negotiable either for circulation or to find a market. Nor are they like corporation bonds, which are issued in negotiable form for sale, and as a means of raising money for corporate uses. The distinction between all these and corporation stock is marked and striking. They are all in some form the representative of money, and may be satisfied by payment in money at a time specified. Certificates of stock are not secu-

rities for money in any sense, much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation, of which he is a member. The primary use and design of this species of property is to afford a steady investment for capital, rather than to feed the spirit of speculation." This opinion has been cited at length, because the case is frequently alluded to in later decisions, and because the distinctions drawn by the learned Judge between stock and the ordinary negotiable securities are so forcibly stated. There were some other cases which arose out of the same Schuyler frauds, and the theory of non-negotiability as laid down in the case just cited seems to be approved in all.[1]

The case of McNeil *v.* The Tenth National Bank,[2] has frequently been relied upon as proving the negotiability of stock certificates, but it would seem that the decision in that case did not involve the question of negotiability at all. The plaintiff kept an account with a firm of stock brokers in New York, relating to certain stocks which they had purchased, and were carrying for him. For the purpose of securing any balance which might become due them on that account, the plaintiff delivered to them a certificate for a number of shares in the capital stock of the National Bank of St. Johnsville, with a blank assignment and power of at-

[1] N. Y. & N. H. R. R. Co. *v.* Schuyler, 34 N. Y. 30; Bridgeport Bank *v.* R. R., 30 Conn. 275; Fatman *v.* Lobach, 1 Duer 354; Leavitt *v.* Fisher, 4 Duer 1.

[2] 1 Sick. 325.

torney indorsed thereon, signed and sealed by the plaintiff. The stock brokers pledged this to another firm, who in turn pledged it to the defendant. All this was without the knowledge of the plaintiff. He was indebted to them on the account for which the shares were pledged to them in a very small amount, but the account had not been rendered or any demand made. The defendants were innocent holders, and the stock brokers of course insolvent. The court decided that the defendants were entitled to hold the stock, but it is submitted without any reference whatever to the question of negotiability.

It was admitted that simply intrusting the possession of a chattel to another as pledgee, is clearly insufficient to preclude the real owner from reclaiming his property in case of an unauthorized disposition of it by the person so intrusted; but, "if the owner intrusts to another not merely the possession of the property, but also written evidence over his own signature of title thereto, and of unconditional power of disposition over it, the case is vastly different." And this was the whole pith of the case. McNeil had given the certificate to the stock brokers, with a power of attorney under his hand and seal, indorsed on the back, expressed to be made "for value received." Now if we recognize the validity of blank powers, and if, as has been held in New York, by the delivery of the certificate with assignment and power indorsed, the whole title, legal and equitable, passes as between the parties, notwithstanding that by the

charter or by-laws of the corporation the stock is declared to be transferable only on its books.[1] In view of all these facts what was to prevent the defendant from asserting a superior equity to the plaintiff? It is a question of estoppel which precludes him from disputing a title which he has apparently conferred, and the doctrine of negotiability has nothing whatever to do with it.[2]

It has been recently decided that in a case where one of four executors put in his broker's hands stock of the decedent's estate, with a power of attorney, signed by him as acting executor, and a blank bill of sale as collateral security for a personal indebtedness, and the broker wrongfully pledged the stock to another who advanced money to him in good faith, the latter took an impregnable title.[3] There is no conflict between this case and the Mechanics' Bank cases; the points involved were entirely different.[4]

It has also been held in New York that where stock stands in the name of a married woman, the certificate is evidence of her absolute ownership in it, and one loaning money upon the pledge of the stock is not bound to inquire how she obtained it. It appears that there was some dispute as to the title to the

[1] Bank *v.* Smalley, 2 Cow. 770; Kortright *v.* Bank, 22 Wend. 362; N. Y. & N. H. R. R. *v.* Schuyler, 34 N. Y. 80.

[2] Wood *v.* Smith, 37 Leg. Int. 315; Cushman *v.* Thayer Manufacturing Jewelry Co., 76 N. Y. 365.

[3] Wood *v.* Smith, 37 Leg. Int. 315.

[4] Leitch *v.* Wells, 3 Sickels 585.

stock, and a question arose as to whether the doctrine of constructive notice by *lis pendens* could be applied to this class of property. The court decided in the negative, and there is a dictum by Earl C. that since McNeil *v.* Tenth National Bank, certificates of stock with blank assignments and powers of attorney attached must be nearly as negotiable as commercial paper. To the same effect is Holbrook *v.* New Jersey Zinc Company.[1] There is a case in the latest volume of the New York reports where an attempt was made to push the doctrine of McNeil *v.* Tenth National Bank to a greater distance, but the attempt proved ineffectual, and the court held that a blank transfer with irrevocable power of attorney in blank, signed by the person who appears by the certificate to be the owner, does not confer upon the holder apparent authority as agent for such owner to pledge the stock as collateral. But here the agent's pledgees had notice.[2] The New York decisions seem to apply in New Jersey.[3]

In Massachusetts the doctrine of negotiability as applied to stock certificates never appears to have been at all favored, as may be seen in the early cases.[4] There are two recent cases in that State which illus-

[1] 12 Sickels 616.

[2] Merchants' Bank *v.* Livingston, 29 Sickels 223.

[3] Mt. Holly Turnpike Co. *v.* Ferree, 2 C. E. Green 117; Prall *v.* Tilt, 28 N. J. Eq. 479.

[4] Jarvis *v.* Rogers, 13 Mass. 105; Sewall *v.* Boston Water-power Co., 4 Allen 277.

trate the principle very well. The first is Pratt *v.* Taunton Copper Co. et al.[1]

Plaintiff was owner of shares in defendant's corporation, the certificates were stolen from her house, and together with a forged power of attorney in her name to the corporation were delivered to brokers for sale. They in turn employed Hawes & Henshaw, stock auctioneers, to sell the shares by auction, and they sold them accordingly. The brokers afterwards presented the certificates and power of attorney in the one case to the clerk of the corporation duly empowered to make transfers, and in the other case to the cashier of the bank, and obtained from each a transfer and new certificate, with a new number in the name of Hawes & Henshaw, and delivered it to them, and Hawes & Henshaw delivered and assigned the new certificates to the purchaser in each case, who thereupon paid to them the sum for which he had bid off the stock, which was its fair market value, and they paid the amount, less their commission, to the brokers. The purchaser surrendered the new certificate to the corporation, and the corporation thereupon issued to him another certificate, which he now holds. Neither Hawes & Henshaw nor the purchaser had any knowledge, until after the transfer and issue of the certificate to him, that the plaintiff ever owned the shares, and the purchaser did not see any certificate of stock until he paid for the one issued to him. The plaintiff brought a bill in equity

[1] 34 Leg. Int. 340.

against each of the corporations and the purchaser of the shares, praying that the latter might be ordered to surrender his certificate to the corporation to be canceled, and that the corporation might be ordered to issue to the plaintiff a new certificate for her shares, and to pay to her all dividends declared, etc. The court held that the plaintiff could not be deprived of her shares without her consent or negligence, and that the power of attorney being forged, she might maintain the bill against the corporation, but refused a decree against the individual defendant, as he had been a purchaser in good faith and for a valuable consideration, without knowledge or notice. His rights against the corporation depended on the effect of the new certificates.

So, also, where a certificate was expressed in the name of A. B., Trustee, and was fraudulently pledged by him for his own debt, the pledgee was held to be put upon inquiry as to the character of the trust, and would not be protected. There is a dictum in that case which distinctly repudiates any idea of negotiability attaching to this class of property.[1]

There is a Common Pleas case in Pennsylvania[2] which illustrates the doctrine very clearly. It was an action of trover for the value of five certificates Pacific Mail. The certificates with blank indorsements had passed by sale from hand to hand until purchased

1 Shaw *v.* Spencer, 100 Mass. 382.

2 Aull *v.* Colket, 2 W. N. 322.

by plaintiffs, who took them in the same manner by delivery. Without having them transferred upon the books or filling up blanks, they put them in their tin box in bank. The key was kept in a private safe at the office, to which Harte, the confidential clerk, had a key. Harte stole them and placed them in his brokers' hands. They held them for three months, and then, under Harte's orders, sold them, reimbursed themselves for money advanced to Harte, and credited him with the balance. Soon after, Harte absconded, when plaintiffs discovered their loss and brought the suit. The Judge charged the jury that the certificates were not negotiable instruments by law, and if the jury find the certificates of stock were stolen from the plaintiffs in this case, then the defendants could have acquired no title at all by any of their transactions, and their verdict should be for the plaintiffs. The court, however, granted a new trial on the question of negligence of the plaintiffs in leaving their certificates in the condition, that if they were negotiable or transferable by delivery they could have prevented the theft by filling their names in the bill of sale and power of attorney, and if not negotiable or transferable that they left them in the condition that Harte might fill in his own name in the blanks, and thus pass title to them, and also whether it is negligence in a party to leave such securities under the control of a clerk or bookkeeper in his employ.[1]

[1] Moodie *v.* Bank, 3 W. N. 118.

It was decided by the U. S. Supreme Court, some ten years ago, that contracts are not necessarily negotiable because by their terms they inure to the benefit of the bearer, and that a receipt by which a person acknowledges that he has received from another named certain shares of stock in a specified corporation entitling the bearer to so many dollars in certain bonds to be issued, is not free in the hands of the transferee from equities, which would have affected it in the hands of the original recipient; [1] and it has more recently been held by the same court, that certificates of stock which on their face declare the stockholder entitled to so many shares, transferable only on the books of the corporation, in person or by attorney, on surrender of the certificates, while not negotiable, approximate to it as nearly as possible.[2] A national bank whose certificates were in this form, and who allowed a stockholder to transfer his stock without giving up his certificates, was held liable to a *bona fide* transferee for value of the same stock, who produced the certificates with a power to transfer executed in a proper form. This case has sometimes been cited in support of the doctrine of negotiability, but as has been remarked by the editor of the latest edition of the Leading Cases, we certainly have no need of resorting to the doctrine of negotiable paper to sustain such a decision, because the bank by its omission to require a surrender of the

[1] Railroad Company *v.* Howard, 7 Wallace 392.

[2] Bank *v.* Lanier, 11 Wallace 369.

certificates on the first transfer was guilty of negligence tending directly as a probable consequence to cause a loss to some one else, and the case being one where one of two innocent parties had to suffer, the loss was properly thrown on the one who was instrumental in bringing the loss about.

One more case must be noticed before closing, and that is Matthews *v.* The Massachusetts National Bank.[1] The defendant loaned Coe twenty thousand dollars, for which he took as collateral what purported to be a certificate of two hundred shares of Boston and Albany R. R. stock. Coe paid his indebtedness, and the cashier of the bank, for the purpose and with the intention of restoring the collateral to him, returned the certificate with the usual form of transfer on the back, signed by the cashier in blank. Coe then borrowed twenty-five thousand dollars from the plaintiff, and gave him the certificate as collateral. The loan was not paid, and upon inquiry it appeared that the certificate was originally for two shares, and had been raised by Coe to two hundred. Coe was bankrupt, and plaintiff brought suit against the bank. The court held the bank liable on the ground that by signing the blank transfer it had so far warranted the genuineness of the certificate as to be estopped from setting up the forgery as a defence to the action.

If this case is to be considered law, we have certainly gone pretty far in the direction of admitting the nego-

[1] 14 Am. Law Reg., N. S. 153.

tiability of stock certificates. It has been attacked, however, in a most elaborate note by Judge Redfield, who shows pretty conclusively that the position taken by the court is entirely untenable in the light of all the authorities.

These cases have been considered at length, because they involve some important principles, and principles too, which, while well settled, seem very often to be misunderstood. The cases do not, according to my understanding of them, establish the negotiability of stock certificates; on the contrary, they distinctly repudiate it. The decisions are based on the theory, not of negotiability, but of estoppel. Take McNeil *v.* Tenth National Bank as a fair sample of them. What do we find? That the decision is founded entirely upon the fact that the plaintiff, by allowing the pledgees, who were stock brokers, to hold his certificates, with a blank power of attorney, executed by himself, and purporting to be for value received, had no reason to complain, if he lost his certificates by fraud, when he had put it into the power of his agents to perpetrate that fraud. It may be said that the bank could have avoided trouble by making inquiry at the office of the corporation as to whose name the title to the shares stood in. Very true, but the plaintiff too could have avoided all trouble by filling up the power of attorney, and then having a re-conveyance made on payment of the loan.

McNeil *v.* Bank enunciated no new principle, nor does it make stock certificates one whit more negotia-

ble than they were before. The same doctrine had been laid down in the old case of Kortright *v.* Bank,[1] and like views prevailed at a very early day in Massachusetts, where the doctrine of negotiability as applied to stock has been fought most strenuously, as has just been seen in Pratt *v.* Taunton Copper Co.

Surely in the light of these facts, the decision in McNeil *v.* Bank could not well have been otherwise. No case has gone farther than this, save, perhaps, Matthews *v.* Bank, which seems in the light of Redfield's note to be at best but doubtful law. While we have direct authority in several cases cited, that the *bona fide* holder of a stolen stock certificate would take no title at all, and the reverse of course would be true if the certificate were negotiable. The word *quasi* negotiability, which we find running through the books, seems an unhappy one; what exactly it means is not very clear.

"There is no intermediary or transitive state," says the learned annotator to Matthews *v.* Bank, "between negotiable and non-negotiable instruments. All contracts or instruments or papers creating indebtedness or rights of action are either negotiable or not so. And if anything is fully settled in law, it is that certificates of stock are not negotiable."

The decisions may almost be said to be resolvable into the following formula. Commercial usage has gone so far as to say that a certificate of stock, accom-

[1] 22 Wend. 362.

panied by an irrevocable power of attorney, either filled up or in blank, is, in the hands of a third party, presumptive evidence of ownership in the holder; and when the party in whose hands the certificate is found is a holder for value without notice of any intervening equity, his title cannot be impeached.[1]

Commercial necessity, so called, has from time to time demanded that stock certificates should be placed on the same level with promissory notes and bills of exchange, but if the past decisions of the courts are to be taken as any index to the future, it will be a long time before the demands will be yielded to, and a moment's consideration will show that the necessity is more fancied than real. Stocks, as has been pointed out, are not creatures of commerce like notes and bills, but are meant to afford a steady investment for capital, rather than to feed the spirit of speculation. This point is too often lost sight of by the advocates of negotiability. Any movement in the direction of the doctrine contended for, would seem likely to open up doors to fraud, which it will be well in these times to keep tightly closed. Property is quite insecure enough, and it behooves us to resist any attempt to increase that insecurity, which would certainly follow, if stock certificates were placed *pari passu* with promissory notes and bills of exchange. Our courts have not as yet gone to such a length. We may confidently indulge in the hope that they never will.

[1] Wood *v.* Smith, 37 Leg. Int. 315.

CHAPTER V.

STATUTE OF FRAUDS.

THE question whether stock can be included under the terms "goods, wares, or merchandise," so as to bring it within the seventeenth section of the Statute of Frauds, is an interesting one, and has led to much litigation. This section of the statute is in force in many, though not all, of the United States, in different forms. It has, however, never been adopted in Pennsylvania.

As early as 1721 the question arose for the first time in England in Pickering *v.* Appleby,[1] and was argued before the Court of Common Pleas, and subsequently at Serjeants' Inn before all the judges of England. For the defendant it was argued that the words of the statute extend to all cases of contracts for the sale of goods, wares, or merchandise, and that shares in such a corporation (a Copper Mining Co.) are merchandise. *Merx est quicquid vendi potest.* It was further said that the intention of the statute was to prevent frauds and perjuries, which were as likely to occur in contracts for stock as for lands, or any other thing, and that, therefore, the intention of the legislature aimed to cover all contracts. For the plaintiff it was argued that all contracts were not intended to be comprised within that statute, for its words make con-

[1] 1 Comyns Rep. 354.

tracts above ten pounds void, unless the buyer accept part of the goods sold, and actually receive the same, or give earnest, or some memorandum of it be in writing, and that though one or other part is sufficient, yet the statute does not extend to contracts where neither one nor the other part can be performed, and therefore where part of the goods cannot be delivered or accepted, it cannot be a contract within the statute, which extends only to such things part whereof may be delivered or accepted; and further, that the transfer of stock at the time of making the statute was unusual, and hence the legislature did not probably have it in view. To which it was replied, that though the statute says that the contract shall be void unless the buyer accept part of the goods, etc., yet it is not necessary that the thing contracted for must, under the statute, be such as can be delivered into the hands of the other party. If there be a contract for goods to be imported in a certain ship, would the contract fall outside the statute because the goods cannot be delivered until the arrival of the ship?

The judges in this case were equally divided in opinion, so that the question remained in abeyance for some years, when the Lord Chancellor, in a nearly analogous case, laid great stress upon the fact, that in a recent case, one Wolstenholm was declared a bankrupt, as having East India stock, but this was reversed by an act of Parliament, declaring that neither he nor any other person should be liable to bankruptcy in respect of their having East India stock; so that stocks,

or the dealing in them, will not make a man liable to bankruptcy, nor do they seem to be goods, wares, or merchandise within the intent of that clause.[1]

This notion of the Lord Chancellor's of drawing the bankrupt law into the question, seems, with all deference, a trifle forced, and this view is sustained by Mr. Roberts in his work on Frauds. He says: "The statute alluded to by Lord King, in Colt *v.* Netterville, had a view only to the protection of persons possessing shares in the stock of certain companies, wherein they laid out their money merely by way of investment, and not for the purpose of trading therein, the dividends on which stock were made partly in goods, and which the parties sold again in order to turn their property to account, but having made themselves partners in a trading company, they had become in danger of being considered as traders. But the statute makes no mention of selling the stock itself. The mere buying and selling of stock, however, will not make a man liable to the bankrupt laws, and the reason given by Lord King does not seem satisfactory; the better reason appears to be, that where the stock is held as an investment of property only, and not as a trading capital, the buying and selling is a speculation, whereby a man seeks to increase his fortune, but not a trading whereby he seeks to increase his living. That stock brokers are within the statute concerning bankrupts is a matter of no doubt, as a

[1] Colt *v.* Nettervill, 2 P. Wms. 307.

species to which the general term brokers in the statute[1] clearly extends; so that the argument mainly relied upon by Lord King, for considering contracts for stock as out of the Statute of Frauds, seems to want support.[2]

Whatever doubt there may have been on the subject was removed by Humble *v.* Mitchell,[3] where Lord Denman decided that shares in a joint stock company are mere choses in action incapable of delivery, and not within the scope of the seventeenth section. And the same was held of stock of a foreign state,[4] and of railway shares,[5] and shares in a mining company.[6] In Knight *v.* Barber[7] the Chancellor inclined to the opinion that the sale of scrip was nothing more than an agreement for the transfer of the interest which the party may possess in the capital of the company, and that interest cannot be said to be either goods, wares, or merchandise. The law may now be considered settled upon this subject in England, by overwhelming authority, and the dicta to the contrary in a few early

[1] V. Geo. 2, c. 39.

[2] Roberts on Frauds 186.

[3] 39 E. C. L. R. 46.

[4] Heseltine *v.* Siggers, 1 Exch. 856.

[5] Duncuft *v.* Albrecht, 12 Simons 189; Tempest *v.* Kilner, 3 C. B. 249; Bowlby *v.* Bell, 3 C. B. 284; Bradley *v.* Holdsworth, 3 M. & W. 422.

[6] Watson *v.* Spratley, 10 Exch. 222, 24 L. J. Ex. 53; Powell *v.* Jessop, 18 C. B. 336, 25 L. J. C. P. 199.

[7] 16 M. & W. 65.

cases[1] have been overruled by express decisions in later times.

In the United States as early as 1810, the Supreme Court of Maryland decided, without giving any opinion, that bank stock would come within the provisions of the statute.[2] In Tisdale *v.* Harris,[3] Shaw, C. J., said: "Supposing this a new question now for the first time calling for the construction of the statute, the courts are of opinion that as well by its terms as its general policy, stocks are fairly within its operation. The words goods and merchandise are both of very large signification. Bona, as used in the Civil Law, is almost as extensive as personal property itself, and in many respects it has nearly as large a signification as the common law. The word merchandise, also, including in general objects of traffic and commerce, is broad enough to include stocks or shares in incorporated companies. The main argument relied upon by those who contend that shares are not within the statute is this: the statute provides that such contract shall not be good, etc., among other things except the purchaser shall accept part of the goods. From this, it is argued, that by necessary implication the statute applies only

[1] Mussell *v.* Cooke, Prec. in Ch. 533; Crull *v.* Dodson, Sel. Cas. in Ch. 41.

NOTE.—There are, however, some few undertakings in the investment market which involve interests in land within the fourth section of the Statute of Frauds. To bind parties contracting in the subject of such undertakings, it would seem sufficient that there is a duly signed memorandum entered in the broker's book. (Thompson *v.* Gardiner, L. R 1 C. P. D. 777.)

[2] Colvin *v.* Williams, 3 H. & J. 38.

[3] 20 Pick. 9.

to goods of which part may be delivered. This seems, however, to be rather a narrow and forced construction. The provision is general, that no contract for the sale of goods, etc., shall be allowed to be good; the exception is when part are delivered; but if part cannot be delivered, then the exception cannot exist, to take the case out of the general prohibition. The provision extended to a great variety of objects, and the exception may well be construed to apply only to such of those objects to which it is applicable, without affecting others to which from their nature it cannot apply. There is nothing in the nature of stocks or shares in companies, which in reason or sound policy should exempt contracts in respect to them, from those reasonable restrictions designed by the statute to prevent frauds in the sale of other commodities. On the contrary, these companies have become so numerous, so large an amount of the property of the community is now invested in them, and as the ordinary indicia of property arising from delivery and possession cannot take place, there seems to be a peculiar reason for extending the provisions of this act to them."

The ruling in this case was followed in Connecticut[1] and Maine.[2] It was held in Vermont, where the plaintiff purchased shares of stock at a given price of the defendant, the latter agreeing to take it back and repay the plaintiff on request, and the plaintiff tendered back

[1] North *v.* Forest, 15 Conn. 400.

[2] Pray *v.* Mitchell, 9 Virgin 430.

the stock and demanded repayment, that the contract for repayment was not within the statute.[1] The Indiana statute uses the word "goods," omitting wares and merchandise, but the Supreme Court of that State has held that the legal effect of the statute was the same as that of 29 Charles II, and that the construction placed upon the latter should govern the former. They held, therefore, that stock contracts would not fall within the statute, on the authority of the English decisions.[2] In some States the difficulty has been overcome by making the statute more comprehensive; thus, the New York act adds the words "things in action,"[3] and it has been held that the mere entry by a clerk of the brokers of the vendor, though assented to verbally by the buyers as correct is not sufficient to take a contract for the sale of stocks out of the statute.[4] The Florida act reads "goods, merchandise, and personal property,"[5] and the same is true in Mississippi.[6]

It has been held that a contract for the sale of a promissory note would fall within the statute;[7] but *aliter* in New Hampshire,[8] a contract for the sale of a bank note has been held within the statute,[9] but not an

[1] Fay *v.* Wheeler, 44 Vt. 292.

[2] Vawter *v.* Griffin, 40 Ind. 593.

[3] Rev. Stat. Edmonds Ed. 140.

[4] Johnson *v.* Mulry, 4 Rob. 401.

[5] Southern Life Ins. Co. *v.* Cole, 4 Fla. 359.

[6] Rev. Code. Ch. 44, Art. 4.

[7] Gooch *v.* Holmes, 41 Maine 523; Gadsden *v.* Lance, 1 McMullan's Eq. 87; Baldwin *v.* Williams, 3 Met. 367; Hudson *v.* Weir, 29 Ala. 294.

[8] Whittemore *v.* Gibbs, 4 Fost. 484.

[9] Riggs *v.* Magruder, 2 Cranch 143.

agreement to transfer U. S. treasury checks.[1] It may fairly be concluded, from the cases cited, that it is the policy of the law to give a liberal construction to the words goods, wares, and merchandise, by including within their scope choses in action, and this would seem only reasonable, for if the statute was passed to prevent frauds and perjuries, it is difficult to see why contracts for the sale and delivery of stock should be less liable to frauds than others which fall within its operation; such seems to be the course of reasoning on this side of the water at least.

[1] Beers *v.* Crowell, Dudley (Geo.) 28.

CHAPTER VI.

Wagering Contracts.

A wager at common law was valid, and could be recovered on in a court of justice.[1] There were exceptions, however, to this general rule, founded on considerations of public policy and public convenience. These were wagers tending to a breach of the peace, wagers on elections, and such as referred to another's person or property, so as to make him infamous, or to be libelous or indecent.[2]

The English courts, however, always looked upon wagers with disfavor, and in all their opinions can be found expressions of regret that their time should be occupied with the consideration of matters so frivolous, and beneath the dignity of the court. So strong had this feeling become that some of the later cases incline to the opinion that it was a matter entirely within the discretion of the Judge whether he would hear an action for a wager or not.[3]

When speculation in stocks began in England early in the last century, it was a custom among the people to contract for the sale and delivery of stock which

[1] Good *v.* Elliot, 3 T. R. 693.

[2] Da Costa *v.* Jones, 2 Cowp. 734; Browen *v.* Leeson, 2 H. Bl. 43; Allen *v.* Hearn, 1 T. R. 56; Hartley v. Rice, 10 East 22; Parsons on Contracts, 6th Ed. 755.

[3] Robinson *v.* Mearns, 16 E. C. L. R. 253; Walpole *v.* Saunders, 16 E. C. L. R. 276.

they did not have in their possession, and in many cases where no delivery was contemplated. To prevent this, the statute[1] generally known as Sir John Barnard's Act was passed. It declared absolutely illegal and void all contracts upon which any premium should be given "for liberty to put upon, or to deliver, receive, accept or refuse, any public or joint stock or other public securities whatsoever, or any part, share or interest therein, and also all wagers and contracts in the nature of wagers, and all contracts in the nature of puts and refusals relating to the then present or future price or value of any such stock or securities." The penalty for making such contracts was fixed at 500 l. The statute also prohibited, under penalty of 100 l., "the payment or receipt of money for the compounding, satisfying, or making up of any difference, for the not delivering, transferring, having or receiving any public or joint stock or other public securities, or for the not performing of any contract or agreement so stipulated and agreed to be performed." Its operation, however, was restricted to the public funds of Great Britain.[2] This Act was repealed in 1861.[3]

There were two other English statutes passed, one of 19 Geo. II. and 14 Geo. III., prohibiting wagering contracts of insurance, but with these exceptions the common law as to wagers remained unchanged until

[1] 7 Geo. 2 c. 8.

[2] Williams *v.* Trye, 23 L. J. Ch. 860; Morgan *v.* Pebrer, 32 E. C. L. R. 202; Nicholson *v.* Gooch, 25 L. J. Q. B. 137; Henderson *v.* Bise, 3 Stark N.P. 158.

[3] 23 and 24 Vic. c. 28.

8 and 9 Vict., c. 109, s. 18, which provided that "all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void, and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

This statute, it will be observed, renders wagering contracts void, but not illegal, a distinction of some importance, which will be presently considered.[1] In the United States the common law as to wagers has not been very rigidly adhered to. The leaning of the Pennsylvania courts, for example, has always been decidedly against the practice of wagering contracts. As early as 1803 it was held that a policy of insurance in which the insured had no interest was a wagering policy, and as such was void.[2] The statute 19 Geo. II., as has been stated, had prohibited policies of this kind in England, but the court admitted that this Act was not in force in Pennsylvania, and held the policy invalid on the sole ground that wagers were contrary to the genius and policy of our people, and were not recoverable in a court of law. This was followed in Phillips *v.* Ives,[3] which was a bet on the life of Napo-

[1] Fitch *v.* Jones, 85 E. C. L. R. 238.

[2] Pritchett *v.* Ins. Co. of North America, 3 Yeates 358.

[3] 1 Rawle, 36.

leon. In this case, Huston, J., expresses his opinion very positively (with a strong dissent by Gibson, C. J.), that, though bets were recoverable by the common law of England, it was not part of the common law introduced into Pennsylvania by William Penn or his successors.[1] So that it may be considered that the invalidity of wagers is part of the common law of Pennsylvania.

The view of the question adopted in Pennsylvania seems to prevail in most of the United States; in a majority, however, it is regulated by statute.[2]

In a few of the States the common-law rule is still adhered to, and wagers will be enforced. This is the case in California, Texas, Delaware, and perhaps some others.[3]

But it may, in spite of these isolated cases, be fairly laid down as a general proposition, that wagering contracts are, as a rule, invalid in the United States, as opposed to the morals and genius of our people.

It is by no means an easy matter, however, to determine in an intricate stock transaction, whether the contract is in the nature of a wager and void, or one of a class of option contracts, which, with certain limitations, are valid.

[1] Edgell *v.* McLaughlin, 6 Whar. 176.

[2] Godsall *v.* Boldero, 2 Smith's Leading Cases 282; Wilkinson *v.* Tousley, 16 Minn. 299.

[3] Johnson *v.* Fall, 6 California 359; Wheeler *v.* Friend, 22 Texas 683; Dewees *v.* Miller, 5 Harrington 347.

For greater accuracy in the treatment of this subject it will be convenient to consider it under two heads:

1. Where the question of the validity of the contract arises between the parties thereto.

2. Where the question of the validity of the contract arises between one party, and the broker employed by him to negotiate the contract.

The first of these divisions may be further divided into several classes.

We shall first consider contracts where the seller has no property to deliver at the time he makes the sale, and no means of getting it save by subsequent purchase. Contracts of this class are technically known as time contracts. They do not seem to have claimed the attention of the courts until the present century. In Lorymer *v.* Smith,[1] Lord Tenterden remarked that "if a man should bargain to deliver corn, not then in his possession, and rely upon making a future purchase in time to fulfill his contract, such a mode of dealing ought not to be encouraged." And the same Judge a few years later said, "I have always thought, and shall continue to think until I am told by the House of Lords that I am wrong, that if a man sells goods to be delivered on a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by assignment, but means to go into the market and to buy the goods which he has contracted

[1] 1 B. & C. 1.

to deliver, he cannot maintain an action on such a contract. Such a contract amounts, on the part of the vendor, to a wager, on the price of the commodity, and is attended with the most mischievous consequences."[1] So the law remained until Hibblewhite *v.* McMorine,[2] which was an action of assumpsit, in which plaintiff averred a contract with defendant for the sale of fifty shares in the Brighton Railway Co., "to be transferred, delivered and paid for on or before the 1st day of March, 1839, or at any intermediate date that defendant might require them." The count further set forth mutual promises, that the plaintiff was ready and willing to transfer and deliver the shares to the defendant, if he would have paid for the same, and that he would have offered him a legal transfer of them, but that the defendant did not nor would accept and pay for the said shares, and refused so to do. To this defendant pleaded that at the time of making the agreement the plaintiff was not possessed of or entitled to the said fifty shares in the Brighton Railway Co., nor had the plaintiff at that time entered into any contract for their purchase, nor had he at the time of making the contract any reasonable expectation of becoming possessed or entitled to any such shares, within the time provided for the fulfillment of the contract, otherwise than by his purchasing them subsequent to the agreement.

The question was argued in the Exchequer Cham-

[1] Bryan *v.* Lewis, Ry. & Moo. 386.

[2] 5 M. & W. 462.

ber before Baron Parke, and judgment was unanimously given for the plaintiff on the demurrer, Baron Parke remarking that he was unable to see what principle of law could be at all affected by a man being allowed to contract for the sale of goods of which he has not possession at the time of making the bargain, and has no reasonable expectation of receiving. This decision settled the law in England, and it has been followed without probably a single departure in this country.[1]

Upon the authority of all the cases the general rule may be laid down, that contracts where the seller has no property to deliver at the time he makes the sale, and no means of getting it, save by subsequent purchase, are unobjectionable in law, and are not in the nature of wagers.

The second class of cases embraces contracts where the purchaser may not have intended to receive the goods, but to resell them before the time fixed for delivery, and the seller knows that such is his intention. The English authority on this point is Ashton *v.* Dakin.[2]

In this case defendant directed plaintiff, who was a stock broker, to buy him certain railway stock, for the next account day, but without any intention, as the

[1] Hanton *v.* Small, 3 Sandford 230; Cassard *v.* Hinman, 1 Bosw. 207; Porter *v.* Viets, 1 Biss. 177; Clarke *v.* Foss, 7 Biss. 540; Sanborn *v.* Benedict, 78 Ill. 309; Brown v. Speyer, 20 Grattan 309; Smith *v.* Bouvier, 20 P. F. S. 325; McIlvaine *v.* Egerton, 2 Robertson 422.

[2] 4 H. & N. 867.

plaintiff was aware, of taking a transfer thereof. The stock was bought by plaintiff's agent, and the bought notes sent to defendant. The day preceding the account day, he directed plaintiff to sell all, and the sale was effected by the same agent. On the account day, plaintiff delivered his account to defendant, who refused to pay, claiming that the contract came within the statute 8 & 9 Victoria, known as the Wagering Act. The plaintiff recovered; Pollock, C. B., remarking that he could see no objection to a man who has great confidence in the judgment of another saying to him, "Will you undertake to buy for me corn, or any other article, not to be paid for till a certain time," and then directing him to sell it again a little before that date. The Court was clearly of opinion that this would not be a gambling transaction, and the present was a similar case. Ashton *v.* Dakin is cited with approval in the recent case of Sawyer *v.* Taggart.

In addition to the classes already named, there are certain contracts, now very numerous, where the seller may deliver at any time he chooses between certain dates. These are technically known as option contracts. They are universally regarded as perfectly valid transactions, for the reason that the sale is not optional, but only the time of delivery.[1] The Courts have gone a step further, and the doctrine has been recently laid down very clearly by the Supreme Court of Kentucky, that apart from what the intention of

[1] Logan *v.* Musick, 81 Ill. 415; Gilbert *v.* Gaugar, 10 Chicago Leg. News 340.

the seller may be, if the purchaser of the commodity, in good faith, intends to receive it, the contract is valid.[1] The intention of the parties gives character to the transaction, and if either party contracted in good faith, he is entitled to the benefit of his contract, no matter what may have been the secret purpose and intention of the other.[2]

There is another very important class deserving consideration, namely, that in which the seller may deliver or not, as he pleases, and where the buyer has the privilege of calling or not calling for a delivery. An excellent illustration of this question is to be found in Chandler's case.[3] The facts were complicated. Chandler, of Chicago, seeking to make a corner in oats for June, 1872, purchased all the "cash oats," and took all the options offered him for June delivery, his object being to put all the oats in market, and compel those who had sold options for June to pay his price, or settle with him, by paying the difference between the prices he paid for the options and the price he should establish in June. He purchased about two and a half million bushels for cash, and bought June options for three millions more. The total amount of oats in Chicago during the whole month of June was only about three and a half million bushels. As part of the arrangement for creating a corner, Chandler also sold "puts"

[1] Sawyer *v.* Taggart, 14 W. P. D. Bush 727.

[2] Pixley *v.* Boynton, 79 Ill. 353; Cassard *v.* Hinman, 1 Bos. 207.

[3] 13 Am. Law Reg. N. S. 310.

or privileges of delivering him oats during the month of June for forty-one cents per bushel, for which the other party paid half a cent a bushel for the quantity named in the contract, which read thus: "Received of A. B. $50, in consideration of which we give him the privilege of delivering to us or not, prior to 3 o'clock P.M. of June 30, 1872, 10,000 bushels of oats at 41 cents a bushel, and if delivered, we agree to receive and pay for the same at the above rate." The total quantity contracted for by these puts was about 3,700,000 bushels, and for which Chandler received at the rate of half a cent per bushel, $18,500.

Before the last day of June oats declined about twenty-six cents per bushel, and the holders of the puts claimed of Chandler the difference between the market price of the oats and forty-one cents per bushel, which Chandler had agreed to pay, amounting to nearly $400,000. Chandler failed and went into bankruptcy, and the creditors claimed the right to prove against the estate.

The Court, in an opinion which will well repay perusal, said that this contract was as manifestly a bet upon the future price of the grain in question as any which could be made upon the speed of a horse or the turn of a card. "The evidence in this case shows that in nearly all the cases of settlements on 'put' or 'option' contracts, the grain is never delivered or expected to be delivered, but the parties simply pay the difference as settled by the prices. But if that were not so in all cases, it is clear that in this case no de-

livery was intended by these 'put' holders, because they knew that Chandler controlled all the oats in the market, and fixed the price, and that their only expectation for success depended on their being able to break the market before their time for delivery expired. Some of them say that they intended to deliver the oats, but it is absurd to suppose that they intended to deliver unless they could do so for less than forty-one cents. They intended to deliver, if they could break Chandler or prevent his 'corner' from culminating, as the jockey may intend to walk his own horse over the course after he has poisoned or lamed that of his competitor.

"They did not intend to deliver if Chandler succeeded. Thus a struggle inevitably ensued between Chandler and the holders of this immense amount of 'puts' and 'options.' Chandler alone, on one side, attempting to hold up the price, and all the rest seeking to put it down."

This class of contracts, accordingly, have been held to partake of the nature of wagers, and are invalid.[1]

The last class of cases to be considered are those where it was the intention of both parties at the time of making the contract, that the property should never pass, but that differences alone should be exchanged on the day fixed for delivery. It is almost unnecessary for us to say that such contracts are entirely void.

[1] Ex parte Young, 6 Biss. 53; Pixley *v.* Boynton, 79 Ill. 351; Pickering *v.* Cease, 79 Ill. 328.

They fell under the ban of Thompson, J.'s, condemnation in Brua's Ap.[1] "Anything," said he, "which induces men to risk their money or property without any other hope of return than to get for nothing any given amount from another is gambling, and demoralizes the community, no matter by what name it may be called."

The principle of law which renders agreements to transfer property, when an exchange of differences alone is contemplated, is perfectly clear,[2] but the difficulty has arisen in telling the exact meaning of those contracts, which, while in substance bets, are often, nay generally, clothed in the form of a sale. This is, generally, a pure question of fact for the jury, but some of the cases will not be unlikely to throw light on the subject.

In Kirkpatrick *v.* Bonsall[3] the agreement read: "Nov. 10, 1870. In consideration of $1000, we agree to deliver B., should he call for it during the first six months of 1871, 5000 barrels of oil. If said oil is called for, this call becomes a contract, ten days' notice shall be given, and B. agrees to receive and pay for the same cost on delivery at 10½ cents a gallon." The Court said that on the face of the agreement, this could not be stamped as a gambling transaction. That it was evi-

[1] 5 P. F. S. 298.

[2] Brua's Ap., 5 P. F. S. 298; Grizewood *v.* Blane, 11 C. B. 528; Ex parte Marnham, 2 DeG. F. & J. 634; Ex parte Young, 6 Biss. 53.

[3] 22 P. F. S. 155.

dent that such agreements can be prostituted to the worst kind of gambling ventures, and therefore its character ought to be weighed by a jury in connection with other facts, in considering whether the bargain was a mere scheme to gamble upon the chance of prices. To the same effect is Grizewood *v.* Blane,[1] where the principle is laid down that, in construing contracts of this as well as of other kinds, that construction is to be preferred which will support it, rather than one which will avoid it. "It is a general rule," says Coke, "that whensoever the words of a deed or of the parties without deed may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with the law shall be taken."[2]

In submitting such a question to a jury they are entitled to take into consideration all the facts in the case. If it be a bargain by which the right of property in a stock vests in a customer, so that he would be entitled to call upon the seller to deliver the stock, that, in law, is a good contract. But if it be nothing more than an agreement that stock is to be carried for the customer by other parties who do not part with the title, and do not agree to sell the stock and vest the title in him, so that he simply takes the chance of making or losing

[1] 11 C. B. 528; Pickering *v.* Cease, 79 Ill. 328; Maxton *v.* Gheen, 25 P. F. S. 166; Bigelow *v.* Benedict, 25 Sick. 202; Tenney *v.* Foote, 11 Chicago Legal News 71; Cassard *v.* Hinman, 1 Bosee 207; Lyon *v.* Culbertson, 83 Ill. 40; Rourke *v.* Short, 25 L. J. Q. B. 196.

[2] Co. Lit. 42, 183.

money by the rise or fall of the stock, then the contract is void.[1]

The financial status of the purchaser is a question which may fairly enter into a determination of these contracts. Would he have been likely to have had the means to pay for the stock? The character of his other dealings in stocks.[2]

If, however, there be a contract in writing for the delivery of stock, signed by both parties, in an action for the non-delivery, it would be no defense for the seller to say that no delivery was ever intended, but only an exchange of differences. To do so would enable the defendant to show that another contract was made at the time not in writing, and which he alleges was illegal, in order to make out the illegality of the written contract. This could not be allowed. "No doubt all contracts which are illegal," says Drummond, J., "may be attacked, but no case has been shown which authorizes a party to prove verbally that another contract (in itself illegal) existed, and so get rid of a written contract, on its face unexceptionable."[3]

The test to be applied to all classes of contracts of this character is well summed up in the dictum of the judge in Clarke *v.* Foss.[4] "The theory seems to be that if the contract was originally valid, no subsequent act of

[1] North *v.* Phillips, 89 Penn. 250.

[2] Kirkpatrick *v.* Bonsall, 22 P. F. S. 155; Fareira *v.* Gabell, 89 Penn. 89.

[3] Porter *v.* Viets, · Biss. 177.

[4] 10 Chic. Leg. News 213.

the parties can have the effect to render it obnoxious to the taint of illegality as being a gambling contract."

The whole subject is well formulized in what may be called the rule of Sawyer *v.* Taggart. When the contract on its face, and according to the customs of the trade, with reference to which it may be shown to have been made, is capable of being enforced by either party against the other, it is a lawful contract, unless at the time of entering into it there was an agreement or understanding between the parties that it should not be performed according to its tenor, either by them or others to be procured by them, but if the understanding and intention of both parties at the time of making the contract was that they were neither to perform it themselves, nor to procure others to perform it for them; or if, by the like understanding, either party may elect before the time of performance not to perform his part, and discharge himself by the payment of the difference between the contract price and the market at the time of exercising his option, or at the maturity of the contract, the transaction is a mere wager.[1]

The question whether a broker can recover from his principal, his commissions, or for advances made to aid him in fulfilling a wagering contract must be considered.

It will be important in adverting to this question to bear in mind the distinction existing between a void contract and an illegal contract. This may be best

[1] Sawyer *v.* Taggart, 14 W. P. D. Bush 727.

illustrated, perhaps, by an example. The Act known as Sir Jno. Barnard's forbade, under heavy penalties, time contracts in the Public Funds of Great Britain. Hence, such contracts became *ipso facto* illegal, and money lent to aid their fulfillment could not be recovered.[1]

The result, however, of a void contract is entirely different. In such cases the law simply says: These contracts being void, we do not touch; we leave you to settle them among yourselves as best you may, but you cannot make use of the courts to aid you in such a settlement. This distinction obviously places the advances or loans made by a broker on an entirely different footing.

If wagers are made illegal in any particular State, the advances made to aid in the fulfillment of such a contract could not be recovered, but if the wager be only void, collateral contracts thereto may be enforced.[2] Hence A cannot recover from B the amount of a wager between them, but A can recover from B the amount of a wager lost by B, and paid by A at B's request to the winner.[3]

The English law, as to the liability of a principal to indemnify his broker for money paid as differences, may be epitomized as follows:

[1] Cannan *v.* Bryce, 3 B. &. Ald. 179; De Begnis *v.* Armistead, 10 Bing. 107.

[2] Thacker *v.* Hardy, 27 W. R. 158.

[3] Oldham *v.* Ramsden, 44 L. J. C. P. 309; Bubb *v.* Yelverton, 24 L. T. 822; Higginson *v.* Simpson, L. R. 2 C. P. D. 76; Beeston *v.* Beeston, L. R. 1 Ex. D. 13. *In re* Lister, L. R. 8 Ch. D. 754.

Where a principal employs a broker on an agreement:

1. That the broker shall buy and sell stock, but in no case claim more than the differences. The transaction is within the 8 and 9 Victoria, and the broker is debarred from recovering either what he has paid as differences or his commissions.

2. That the broker should make contracts with jobbers, and that the principal should never be called upon to pay or receive more than differences, if the broker succeeded. The transaction is not within the Act, and the principal is liable on an implied, as merely collateral contract, to indemnify the broker and pay his commissions. Had the contract in this last instance been directly between the jobber and outside principal, it would have stood upon the same footing as that in (1), and could not be enforced by either party, but bargains between a broker and jobber are real bargains.[1]

The cases in the United States have very generally followed the English authorities. The leading case is perhaps that of Lehman *v.* Strassberger.[2] Lehman Bros., cotton factors in New York, were employed by Strassberger, a resident of Alabama, to buy and sell cotton for him for future delivery, with the understanding that there was to be no delivery, but that differences were to be paid, unless there were special instructions

[1] Cavanagh's Law of Money Securities 536.

[2] 2 Woods' Circuit Ct. 554.

to the contrary. Lehman Bros., in accordance with the rules of the Cotton Exchange, made contracts for cotton with other parties not disclosed, which resulted in losses that Lehman Bros. paid, and afterwards Strassberger gave his note to them for the amount. "This is the case," said the court, "to put it in the strongest light for the defendant, of an agent who advances money to his principal to pay losses incurred in an illegal transaction, and takes his note for the money so advanced. In such a case the contract between the principal and agent, made after the illegal transactions are closed, although it may spring from them, and be the result of them, is a binding contract. The fact that the agent includes in a note given for money paid by him for losses in an illegal transaction, compensation for his services, does not taint the note. Such commissions would not avoid the note unless given for services in a transaction, which is not merely *malum prohibitum*, but *malum in se*."[1]

The law in Pennsylvania upon this question is unique, and opposed to all the authorities. Two cases, the only two upon the point in that State, have arisen within the past three years. Fareira *v.* Gabell[2] was the first. It was an action by a broker, upon notes given by the defendant, for money advanced by the broker, to cover the defendant's losses upon wagering

[1] Owen *v.* Davis, 1 Bailey 315; Armstrong *v.* Toler, 11 Wheaton 274; Ramsey *v.* Berry, 65 Me. 570; Durant *v.* Burt, 98 Mass. 161.

[2] 6 W. N. 490.

contracts in stocks, which the broker had made for the defendant at his request and for commissions.

The court below instructed the jury *inter alia* as follows: "It is, however, contended by the plaintiff's counsel, that even if these were gambling operations on Gabell's part, and so understood by Fareira, he should still, in equity and good faith, be paid for the services which he rendered as Gabell's agent, and Gabell cannot rely on a fault which was common to both, as a defense; and it is said, in support of this proposition, that one who lends money knowing that the borrower intends to gamble with it, may recover it back. This may perhaps be true as between such a borrower and lender, but I am clearly of opinion that one who should undertake to make a bet or wager for another, and advance the money staked, would have no right of action against his principal in the event of loss, and I can see no difference between such a case and that of an agent who renders services and expends money in conducting any other gambling operation." The plaintiff did not recover. While this case was pending in the Supreme Court, another, almost its parallel, arose. It was an action to recover money paid as the difference in market price of Pennsylvania Railroad stock, at the time of selling short, and taking in upon the alleged order of defendant decedent. The court instructed the jury that if the parties had dealt with each other as principal and agent, and if the decedent had employed Thomas as his agent, and the latter in pursuance of decedent's directions had bought

the stocks for him, and settled for them by paying the differences out of his own pocket, the plaintiff could recover.[1] Pending the argument upon the rule for a new trial, Fareira *v.* Gabell was affirmed by the Supreme Court, for the reasons given by the court below, no further opinion being rendered.[2] The rule for a new trial in Thomas *v.* Smith was accordingly made absolute, but the court delivered an opinion in support of its ruling at the trial. This opinion is well worth perusal. After alluding to the ground taken in Edgell *v.* McLaughlin,[3] that wagers are not contrary to law, but being of a frivolous nature are beneath the notice of courts of justice, the opinion continues: "If, then, a wager upon stocks be not in itself contrary to any law, if it be neither *malum prohibitum* nor *malum in se*, there would seem to be good reason for holding, that although such a wager, being an idle and frivolous contract, cannot be recovered on as between the parties to the contract; yet that one who at the instance and request of another, has lent him money to enable him to pay the wager, should, in an action for money lent and advanced, be permitted to recover that money back. In such a case the action is not between the parties to the wager, and what is recovered is not the wager, but the money lent; nor does the fact that the plaintiff was the defendant's agent, in

[1] Thomas *v.* Smith, Executor, 7 W. N. 390.

[2] Fareira *v.* Gabell, 8 Norris 89.

[3] 6 Wh. 176.

making the wager for him, make any difference, because the making of such contracts is not prohibited, and the transaction is not contaminated by any violation of law."

The result of the decision in Fareira *v.* Gabell is to leave the Pennsylvania broker, in transactions where no stock is to be delivered and where he has advanced money, in a sorry plight. He is thrown back entirely upon the honor of his principal, and must needs be over-cautious in protecting himself. It is much to be hoped that at an early day some means, judicial or legislative, may be found to assimilate the law upon this subject in Pennsylvania to the more reasonable rule prevailing in the other States and in England.

It is a general principle of law that contracts in restraint of trade are void, unless the restraint be partial, reasonable, and for a valuable consideration.[1]

As a corollary to this, it has been decided that combinations entered into for the purpose of preventing the parties thereto, or others, from engaging in trade are illegal.[2]

So in the Morris Run Coal Co. *v.* Barclay Coal Co.,[3] a contract was entered into between five coal companies, by which it was agreed that the coal market in certain regions was to be divided among the contracting parties in certain proportions, with a proviso that

[1] Mitchell *v.* Reynolds, 1 Sm. Ldg. Cas. 705.

[2] Bispham's Equity, Sec. 228 and Cases cited.

[3] 68 Penn. 173.

the several companies should sell coal only to the extent of their proportion, and only at prices adjusted by a committee. The result of this combination was to control the value of coal in an extensive market, and to cause it to bring prices which it would not have commanded had it been left to the natural laws of trade. It was held that a combination so wide in its scope, general in its influence, and injurious in its effects, was a contract against public policy, and void.[1]

These contracts, and others like them, serve to create what are technically known as "corners," sometimes in grain, sometimes in pork, sometimes in stock, in fact they may exist in any article of commerce.

A contract of this kind, with reference to stock, came before the Supreme Court of Massachusetts some few years ago. Plaintiff, the firm of Thaxter & Co., and Richardson, entered into an agreement to operate in the stock of the Malden and Melrose Horse Railway Co., for the purpose of getting a "corner," Thaxter & Co. taking one-half, and the plaintiff and Richardson each one-quarter interest in the operation. The plan of operation was as follows: Thaxter & Co. were to be the managers, and were to buy up a large quantity of the stock, and control it in such a manner as to make a large demand for it, so that the parties selling on time would be compelled to pay large differences. Thaxter & Co. were then to receive and make proposals and agreements thereon for the pur-

[1] Bispham's Equity, Par. 228 and cases cited.

chase of stock, to be delivered at a future day, the parties agreeing to sell not then having the stock in possession or owning it, and then the sellers, when the day for delivery should arrive, would be compelled to pay such prices or differences as the parties to this combination might ask. The money to carry on the operation was to be furnished, and the profits or losses shared or borne, by the parties in proportion to their respective interests. The venture proved unsuccessful, and this action was brought by one of the parties against the executor of Thaxter to recover the amount paid in by him.

The court characterized the transaction not as a contract, but as a conspiracy, and pronounced it illegal and void. The plaintiff was held not to be entitled to recover any amount actually expended or appropriated according to the terms of the agreement, but that he could reclaim any balance not so expended or appropriated, upon the ground that the losing party may reclaim his deposit from the stakeholder at any time before it has been paid over to the winner.[1] To the same effect is a recent case in Nebraska.[2]

[1] Sampson *v.* Shaw, 101 Mass. 145.

[2] Rudolf *v.* Winters, 7 Neb. 125.

CHAPTER VII.

PLEDGES.

It is proposed in this section to consider the questions growing out of the deposit of corporate bonds or stock as collateral security. Whether such a deposit is a pledge, a mortgage, or a hypothecation must first be determined.

A pledge is a bailment of personal property as a security for some debt or engagement. A delivery of the thing pledged is essential to the contract, and until such delivery the special property that the bailee is entitled to hold does not vest in him.[1] The distinguishing feature of a pledge has always been that the title remained in the pledgor, but the possession, coupled with what is called a special property, passes to the pledgee.[2] A pledge is, of course, a contract. The consideration passing is the security that the pledgee derives from the possession of the property of the debtor, and the credit or other advantage obtained by the pledgor.

A pledge is to be distinguished, first, from a mortgage, which is a sale of goods with the condition attached that if the mortgagor performs some act, it

[1] Mulliner *v.* Florence, L. R. 3 Q. B. D. 484; Brewster *v.* Hartley, 37 Cal. 15.

[2] Barrow *v.* Paxton, 5 Johns. 258; Homes *v.* Crane, 2 Pick. 607; Jones *v.* Smith, 2 Vesey, Jr., 372.

shall be void. The legal title is in the mortgagee, but possession is in the mortgagor, as a general rule, although in Pennsylvania and some other states there can be no mortgage of personalty unaccompanied by transfer of possession.[1]

A pledge must also be distinguished from a lien, which merely carries with it a power of detention until the debt is paid, while a pledge implies a power to sell on non-payment of the debt.[2]

Hypothecation is properly a maritime term for the contract that a creditor may cause some specific thing, over which he has no corporeal control as pledgee, to be sold for the satisfaction of his demand. A vessel, for example, is said to be hypothecated for the demand of one who has advanced money for supplies. Primarily it is a civil law term for a kind of pledge in which the pledgor retained possession or enjoyment of the thing, like a modern mortgage.

Now it is obvious from what has just been said, that if A borrows a hundred dollars of B, and delivers his watch to the lender as security for the payment of the loan, it is a clear case of pledge, and the relation of pledgor and pledgee is thereby created. The legal title to the watch remains in A, but B has a special property, and if the loan be not paid may, after due notice, sell, and thus divest the pledgor's title. With reference to stock, however, it may be argued that the case is altogether different, because possession thereof cannot ordinarily be transferred by mere delivery of

[1] Clow *v.* Woods, 5 S. & R. 275.

[2] Thames Iron Works Co. *v.* Patent Derrick Co., 1 J. & H. 93.

the certificates, but by a written transfer, which at once confers the legal title upon the depositary, and converts the transaction into a mortgage.

This line of reasoning, while plausible, is unsound, and in just this respect, that while the proposition is perfectly true that possession in the pledgee is the distinguishing characteristic of a pledge, still the rule has been so far modified that this possession must be according to the nature of the thing pledged, and where the pledge does not permit of manual delivery, but consists of stocks which are transferred upon the books of the company, with issue of a new certificate. If the transfer be to secure a debt, and the debtor has the right to the restoration of the property on payment of the debt at any time, the transaction is a pledge and not a mortgage, although the legal title passes to the creditor.[1] This is a very nice and refined distinction, but as a consequence of it, it is held that the creditor takes the stock to hold, and not to use, that the special property alone is in him, that he cannot sell the stock until the debt is due, nor without due notice, and if the debt be payable on demand, or payable presently without demand, he cannot sell until demand, even though there was a waiver of notice expressly stipulated for. This, however, has been modified by more recent decisions.[2] As has been just stated, the first step necessary to constitute a pledge is delivery.

[1] Parsons on Contracts, vol. 2, p. 113.

[2] Campbell *v.* Parker, 9 Bosw. 322; Allen *v.* Dykers, 3 Hill 593; Gilpin *v.* Howell, 5 Penn. 41; Morris Canal and Banking Co. *v.* Fisher, 9 N. J. Eq. 667; Morris Canal and Banking Co. *v.* Lewis, 12 N. J. Eq. 323.

Bearing in mind that reference is had only to the stock and bonds of incorporated companies, what amounts to a delivery?

1. Coupon bonds, such as are payable to "bearer," both principal and interest. Title to these passes by simple change of possession. They are negotiable, and the holder is the owner.[1]

2. Registered bonds. A perfect title can only be acquired by a transfer upon the books of the company. Notice to the company of assignment, however, would be sufficient to protect the pledgee. This precaution is often omitted, and the bond or certificate, in the name of the pledgor or a stranger, accompanied by a bill of sale power, executed in blank, is held by the pledgee.[2] This is a dangerous practice, as will be seen hereafter.

3. Stocks transferable by delivery. In a few instances stock is made transferable by simple surrender of the certificate, with or without indorsement.[3] This is usual among a certain class of Western mining stocks, but beyond these it is rarely found.[4] In such a case possession gives a perfect title. This class of securities is assuming some prominence at the present time, owing to the increased amount of Eastern capital invested in Western mining enterprises.

[1] Murray *v.* Lardner, 2 Wallace 110; Morris Canal and Bank Co. *v.* Lewis, 12 N. J. Eq. 323; Id. *v.* Fisher, 9 N. J. Eq. 667.

[2] Judson *v* Corcoran, 17 Howard 612; State Ins. Co. *v.* Gennett, 2 Ten. Ch. 100.

[3] Jarvis *v.* Rogers, 13 Mass. 105.

[4] Brewster *v.* Hartley, 37 Cal. 15.

4. Stocks generally. With the exception before noted, they are made "transferable only upon the books of the company, in person or by attorney." An equitable title is obtained by the usual method of delivery of the certificate, with a bill of sale power in blank, as in the case of registered bonds.[1] This principle was recently recognized in Pennsylvania, where it was held that a parol agreement to transfer stock as collateral security, followed by the execution of a letter of attorney to transfer the same, worked an equitable assignment of the stock.[2] This power does not give a complete legal title until there has been a transfer upon the books of the company in the manner prescribed by the by-laws thereof.[3] Notice of the assignment to the corporation would, as in the case of registered bonds, be sufficient.[4] It is, however, better practice to make the transfer on the company's books, both on account of the greater certainty of title, as well as to enable the pledgee to collect interest or dividends accruing during the continuance of the contract of pledge, which are included as part of the security applicable to the discharge of the debt. The new certificate or the corporate records might set forth the

[1] Sitgreaves *v.* Farmers and Mech. Bank, 13 Wr. 359; Denney *v.* Lyon, 2 Wr. 98; Bank Commerce *v.* Ap., 73 Pa. 59; Fisher *v.* Essex Bank, 5 Gray 373; Pinkerton *v.* R. R., 42 N. H. 424; People's Bank *v.* Gridley, 11 Chic. L. N. 332; State Ins. Co. *v.* Sax, 2 Tenn. Ch. 507.

[2] Lightner's Ap., 1 Norris 301.

[3] Wilson *v.* Little, 2 N. Y. 443; Telegraph Co. *v.* Davenport, 7 Otto 369; Roberts' Ap., 4 Norris 84.

[4] Bispham's Eq. 223.

transferee as absolute owner of the stock, but such a transaction could be proved a pledge by parol evidence, and so enforced among the parties.[1] It is not unusual, however, for the new certificate to express on its face that the pledgee holds as collateral security only, and unless this is done, and the instrument of transfer describe the debt, the pledgee will in some states be held to a shareholder's liability in his pledgor's stead.[2] But of this hereafter.

The relation of the pledgee to the corporation while he continues pledgee is important. It was held in Wheelock *v.* Kost[3] that he is subject to the same liabilities that any other stockholder is subject to. And it has been decided in New York that he remains so liable until the pledgor takes out a new certificate, even though the debt has been paid, and the certificate with power delivered to him by the pledgee.[4]

The right to vote upon pledged stock remains in the pledgor.[5] The pledgee has no right to vote upon it as owner,[6] but the fact that he does so vote will not amount to a conversion.[7] In New York no one is allowed to vote on stock pledged as collateral security.[8]

[1] Newton *v.* Fay, 10 Allen 505; Pinkerton *v.* R. R., 42 N. H. 424; Brick *v.* Brick, 8 Otto 514.

[2] Schouler on Bailments, 183.

[3] 77 Ill. 296.

[4] Adderley *v.* Storm, 6 Hill 624; Johnson *v.* Underhill, 52 N. Y. 203.

[5] Merchants' Bank *v.* Cook, 4 Pick. 405; ex parte Willcocks, 7 Cowen, 402.

[6] McDaniels *v.* Flower Brook Manufacturing Co., 22 Vermont 274.

[7] Heath *v.* Silverthorn Co., 39 Wis. 147.

[8] 2 Rev. Stat., 5th Ed.; Butterworth *v.* Kennedy, 5 Bosw. 143.

The question of the relation of the pledgor and pledgee of stock to the corporation itself, and to third parties, has met with an elaborate discussion in a recent article in the American Law Review, from which I take the liberty of quoting a few extracts. Speaking of the provision in the corporation by-laws, that stock shall be transferable only upon the books of the company, it continues: "On the one hand the courts of the several states, notably those of New York and New Jersey, hold that such a provision means that the company will not recognize any one as owner of the stock unless it be so transferred, but that it does not affect the rights which another person may acquire as against the stockholder by the delivery of the certificate in pledge.[1] A transfer by delivery of the certificate is, nevertheless, valid against an attaching creditor of the pledgor when the attachment is made after such transfer, but before any transfer has been made upon the books of the company.[2] But on the other hand the doctrine is established in other states, particularly in the New England States, Pennsylvania, Illinois, California, and Tennessee, that the mode of transfer of stock pointed out by the company's charter, or

[1] McNeil *v.* Bank, 46 N. Y. 325; N. Y. & N. H. R. R. *v.* Schuyler, 34 N. Y. 30; Blouin *v.* Hart, 30 La. Ann. 714; Lee *v.* Bank, 2 Cin. (Ohio) 298. State Bank of S. C. *v.* Cox, 11 Rich. Eq. 344; Newberry *v.* Iron Co., 17 Mich. 141; State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 100; Bridgeport Bank *v.* N. Y. & N. H. R. R, 30 Conn 231.

[2] Broadway Bank *v.* McElrath, 13 N. J. Eq. 24; Hunterdon Co. Bank *v.* Nassau Bank, 17 N. J. Eq. 496; Rogers *v.* N. J. Ins. Co., 8 N. J. Eq. 167.

valid by-laws, is the only method of passing the legal title to it, or transferring the attachable interest in it."[1]

The pledgee having acquired possession of the pledge must retain it, for should he re-deliver it to the pledgor the contract of pawn is at an end. There are exceptions to this rule, however, as where the pledgee of a bond delivers it to the pledgor to be converted into stock, or have some duty performed upon it.[2] In such a case the pledgor acts as servant or special bailee of the pledgee, and the latter could maintain an action of trover against him for the bond.[3] The pledgee is entitled to collect all the interest and dividends on bonds and stocks during the continuance of the contract of pledge, and may hold these as he does the pledge itself, as security for the debt. They must be accounted for, however, upon the general settlement.[4] As a matter of practice it is usual to pay interest or dividends over to the pledgor, if the collateral is sufficient to insure payment of the debt. If the stocks and bonds stand in the pledgor's name upon the books of the company, this question is unimportant, as the dividends and interest would accrue to the pledgor, and be entirely within his control. Any ex-

[1] Fisher *v.* Essex Bank, 5 Gray 373; Williams *v.* Mech. Bank, 5 Blatchf. 59; Brown *v.* Adams, 5 Biss. 181; Bank of Commerce's Ap., 73 Penn. 59; Naglee *v.* Pacific Wharf Co., 20 Cal. 529; Shipman *v.* Ætna Ins. Co., 29 Conn. 245; Dutton *v.* Conn. Bank, 13 Conn. 493.

[2] Reeves *v.* Capper, 5 Bing. N. C. 136; Cooper *v.* Ray, 47 Ill. 53.

[3] Hays *v.* Riddle, 1 Sandf. 248; Thayer *v.* Dwight, 104 Mass. 254.

[4] Isaac *v.* Clark, 2 Bulst. 306; Hasbrouck *v.* Vanderoort, 4 Sandf. 74; Edwards on Bailments, Par 300 and cases cited.

penses incurred by the pledgee about the pledge that are necessary and proper for its preservation and protection, must be reimbursed by the pledgor and are secured by the pledge.[1] This with reference to stock may be of considerable moment. The number of stocks that are assessable and forfeitable for non-payment of assessments is rapidly increasing. The pledgee would doubtless be justified in paying these levies for the preservation of his securities.

It would go almost without the saying, that a trustee who pledges the stock of his *cestui que trust* to secure his own debt commits a breach of trust; and it has been lately held that the pledgee of stock standing in the name of A. B., trustee, is by the terms of the certificate put upon inquiry as to character and limitations of the trust.[2] The law is different in the case of executors. The executor has the right to sell and transfer, and one who buys of him in good faith, and pays in money the price agreed upon, is not responsible for the application of the purchase-money.[3] The question of a pledge by an executor has lately received careful consideration in Pennsylvania. Testator, by his will, appointed four executors; one of these placed in the hands of his brokers certain certificates of stock belonging to testator's estate, accompanied by a bill of sale and power in blank, and signed by him as act-

[1] Story, Bailments, Par. 307 A.

[2] Duncan *v.* Jaudon, 15 Wallace 165; Shaw *v.* Spencer, 100 Mass. 382.

[3] Leitch *v.* Wells, 48 N. Y. 585; Stinson *v.* Thornton, 56 Ga. 377.

ing executor as collateral for a personal indebtedness. The brokers knew that the stock belonged to the estate of the testator, and not to the executor, and further that there were other executors who did not join. The court held that the brokers acquired no title to the shares, but that the title remained in the estate, and that the brokers were possessed of sufficient knowledge to have put them upon inquiry. They were accordingly decreed to return the stock to the estate, purged from the lien of the broker.[1] This is merely a strong illustration of the principle laid down in Porter *v.* Parks,[2] that where one dealing with the apparent owner of stock has actual notice of the rights of the true owner, he takes no better title than the apparent owner can lawfully transfer.

In another case in which the same executor was involved, the brokers had tortiously repledged the stock to parties who had no knowledge of the fraud. They were held to be entitled to protection, because they had no knowledge of the collusive transaction between the executor and the first pledgee, and because the law casts no duty upon a purchaser to ascertain if the trusted executor of the decedent's will is mismanaging the estate in fraud of creditors or legatees.[3]

We come now to the consideration of a class of cases in which a broker receives from a customer an

[1] Ellis' Ap., 8 Weekly Notes 538.

[2] 49 N. Y. 564.

[3] Wood *v.* Smith, 8 Weekly Notes 441; Prall *v.* Tilt, 28 N. J. Eq. 479.

advance of money as a margin, and agrees to carry stock for him on speculation. In such cases the broker is supposed to hold the stock as security for his advances. The result of such an agreement is practically this: The broker agrees. 1. At once to buy for the customer the stocks indicated. 2. To advance all the money required for the purchase beyond the margin furnished by the customer. 3. To carry or hold such stocks for the benefit of the customer, so long as the margin is kept good, or until notice is given by either party that the transaction must be closed. An appreciation in the value of the stocks is the gain of the customer, and not of the broker. 4. At all times to have in his name or under his control and ready for delivery the shares purchased, or an equal amount of other shares of the same stock. 5. To deliver such shares to the customer when required by him upon the receipt of the advances and commissions accruing to the broker, or 6. To sell such shares upon the order of the customer, upon the payment of the like sums to him, and account to the customer for the proceeds of such sale. Upon such a contract the customer undertakes: 1. To pay a certain margin on the current market value of the shares. 2. To keep good such margin, according to the fluctuations of the market. 3. To take the shares so purchased on his order whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker.[1]

[1] Per Hunt, Ch. J., in Markham *v.* Jaudon, 41 N. Y. 239.

This then being the status of the parties with reference to the transaction, it is important to consider the legal relation of the parties to each other. It is quite clear that when the broker purchases stock on the order of his customer, it is the simplest example of principal and agent, but the moment he begins to advance money to his customer the whole condition of things is changed, and the parties assume new relations.

Now what are these new relations? This was the point involved in the well-known case of Markham *v.* Jaudon, where it received a most elaborate consideration, and in the investigation of this subject the opinions in that case will be closely adhered to. The plaintiff contended that the new relation was that of pledgor and pledgee.

The defendants, on the other hand, contended that the relation of the parties was "wholly by force of a mutual and dependent contract, that defendants' agreement to hold or carry the stock was dependent on the plaintiff furnishing them with the means so to do, and that when the plaintiff failed in that respect the obligation to hold the stock ceased, and the right to sell it was complete."

The majority of the court inclined to the former view, and added that the transaction practically amounted to this: "The plaintiff calls upon the defendants, who are brokers, to purchase for him certain shares of railroad stock, and furnishes them with $1000 for that purpose, agreeing to pay interest on advances they shall

make in the purchase and commissions. The defendants make the purchase, having themselves advanced ninety per cent. of the purchase-money. They bring to the plaintiff the certificates of stock thus purchased by him, and for him, and deliver them to him as the owner thereof. He thereupon hands them back to the defendants to hold as security for their advance on the purchase with interest and commissions. If these precise forms had been observed, no one would deny that the redelivering of the certificates would have constituted a strict formal pledge. In my opinion, the transaction as it took place, amounted to the same thing. To have delivered the certificates to the plaintiff, and that the plaintiff should then have returned them to the defendants to be held by them as security for their advance in their purchase, would leave the parties in precisely the same situation as if the defendants had retained them for that purpose; the form of a delivery to the plaintiff and a redelivery by him to the defendants being waived by agreement of the parties. It comes within the principle that where the pledgee has the thing in his possession, the contract of pledge operates as a delivery the moment the contract is completed."

Such was briefly the reasoning of the judge who delivered the majority opinion of the court. There was, however, a strong dissent from two of the judges, who were of opinion that in such contracts which were purely speculative and where there was no intention that there should be any real purchase or sale of

stock, but merely an exchange of balances, it was impossible to say that any such relation as that of pledgor and pledgee was thereby created; that they were executory agreements for a pure speculation in the rise and fall of stock, which the broker, on condition of perfect indemnity against loss, agreed to carry through in his own name and on his own means of credit, accounting to his customer for the profits, if any, and holding him responsible for the loss; and that the title to the stocks was never in any sense in the supposed pledgor.

The ulterior point in the case was as to the validity of a sale for want of requisite margin without demand and notice to the plaintiff. If the transaction was a contract of pledge, the sale was of course invalid, being a private one, made at the Board of Brokers, in default of any notice to the pledgor. If not a pledge, however, the sale would have been valid. This subject will be referred to again when we come to consider the sale of pledges.

The doctrine that contracts, such as the one which formed the ground of action in Markham *v.* Jaudon, are pledges, and subject to the rules governing such transactions, has been maintained again and again, and may now be considered well settled.[1]

[1] Markham *v.* Jaudon, 41 N. Y. 235; Baker *v.* Drake, 66 N. Y. 518; Laurence *v.* Maxwell, 53 N. Y. 19; Baker *v.* Drake, 53 N. Y. 211.

CHAPTER VIII.

SUB-PLEDGES.

In considering the question of sub-pledging, it will be necessary to keep in mind the fundamental difference already alluded to between a pledge and a lien, and more especially as regards the powers of a person entitled to a lien, and the powers of the person who holds goods upon an agreement of deposit, by way of pawn or pledge, for the due payment of money. "In the case of a simple lien," said Mr. Justice Mellor, in Donald *v.* Suckling, "there can be no power of sale or disposition of the goods which is inconsistent with the retention of the possession by the person entitled to the lien; whereas, in the case of a pledge or pawn of goods to secure the payment of money on a certain day, on default by the pawnor, the pawnee may sell the goods deposited and realize and become a trustee for the overplus for the pawnor, or even if no day of payment be named, he may, upon waiting a reasonable time and taking the proper steps, realize his debt in like manner."[1] The question thus arises is the right of retention in case of a lien, either by a custom or contract, otherwise different from a deposit by way of pledge for securing the due payment of money than in the incidental power of sale, in the latter case on condition broken, or, in other words, on a contract of pledge is it implied that the pledgee shall not part with the pos-

[1] L R. 1, Q. B. 604.

session of the thing pledged until default in payment, and if so is that of the essence of the contract, so that the violation of it makes void the contract?

Story, in his work on bailments, states the principle to be that: "The pawnee may, by the common law, * * * * sell or assign all his interest in the pawn, or he may convey the same conditionally by way of pawn to another person without in either case destroying or invalidating his security. But if the pawnee should undertake to pledge the property not being negotiable securities for a debt beyond his own, * * * he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee."[1]

The above statement is rested by Judge Story upon a Massachusettt case[2] and some very early English cases.[3] The American case, however, would hardly seem to be indisputable authority for such a conclusion, because it was decided solely upon the ground that certain pledged certificates were of a negotiable character, which of course altered the whole question. Another early English case has been often cited as authority for the right to sub-pledge, but it has been said that that case "rather appears to justify the liberty on the inference drawn by and stated in the reporters' marginal note than to lay it down as a proposition

[1] Story on Bailments, Sec. 324.

[2] Jarvis *v.* Rogers, 13 Mass. 105; 15 Mass. 389, 408.

[3] Mores *v.* Conham, Owen R. 123; Ratcliffe *v.* Davis, 1 Buls. R. 29.

already established by authority."[1] It is undoubtedly true, however, that there are some early English and American authorities, which look very much in the direction of the right to sub-pledge,[2] but the subject never received any very careful consideration until the comparatively recent case of Donald *v.* Suckling,[3] which must be carefully considered.

The facts were these: A deposited certain debentures with B as security for the payment of a bill of exchange drawn and endorsed by A and discounted by B as pawnee upon an agreement that he should have "full power to sell or otherwise to dispose of" the debentures if the bill was not paid at maturity. B repledged the debentures to C, and as against C it was assumed by the court that the pledge took place prior to the time when the bill it was originally given to secure fell due, and was made also to secure a greater sum than was represented by the said bill. A sued C in detinue; C pleaded the facts and A demurred, thus apparently raising the pure question of law whether the sub-pledge was lawful. Now it is perfectly obvious that two questions might arise in this case: 1. Did B have the right to sub-pledge? 2. If this be answered in the negative, did the repawning vitiate the entire contract and determine *eo instanti* the pledgor's right to repossession and render the pawnee liable in trover to the pawnor for the full value of the pledge.

[1] Tyler on Usury, 567.

[2] Mores *v.* Conham, Owen 123; Anon. 2 Salk. 522; Thompson *v.* Patrick, 4 Watts, 114.

[3] L. R., 1 Q. B. 585.

On both of these questions the court was divided. After a very exhaustive review of the authorities, Justices Mellor and Blackburn answered the first question in the affirmative. After an equally elaborate opinion Mr. Justice Shee reaches an exactly opposite conclusion, while Chief Justice Cockburn reaches no conclusion at all, thinking that the case did not call for a decision on that point. He gives an intimation as to his views, however, when he says: "I think it unnecessary to the decision in the present case to determine whether a party with whom an article has been pledged as a security for the payment of money has a right to transfer his interest in the thing pledged, subject to the right of redemption in the pawnor to a third party, I should certainly hesitate to lay down the affirmative of that proposition. Such a right in the pawnee seems quite inconsistent with the undoubted right of the pledgor to have the thing pledged returned to him immediately on the tender of the amount for which the pledge was given."

It may be fairly argued therefore that on the first question of the right to repledge, Donald *v.* Suckling, decided nothing. The court, however, did answer the second question by holding that sub-pledging does not vitiate the entire contract, and in the case before the court A could not maintain detinue without having paid or tendered the amount of the bill, while however Donald *v.* Suckling did not decide that a sub-pledge was valid, still by holding that the pawnor could maintain no action until he tendered the debt, it to all practical purposes validated a sub-pledge.

A later English case has gone still further in holding that until the debt is paid off the pledgee has the whole present interest, and that even the sale by him will not entitle the pledgor to bring an action of trover or of detinue, each of which assumes an immediate right of possession in the plaintiff. In other words, a sale does not put an end to the bailment, or revest the immediate right of possession in the pledgor. In so far, however, as the pledgee by disposing of the reversionary interest of the pledgor causes him any difficulty in obtaining possession of the pledge on payment of the sum secured thereby does him any real damage, he commits a tort for which he is liable.[1] And in Talty *v.* Freedman's Saving and Trust Co., a *bona fida* purchaser of a pledge was declared to acquire an interest in it which cannot be taken from him, without tendering to him the amount due on the pledge.[2]

Under these decisions the right to sub-pledge may be considered as fully recognized, except in certain localities where the subject is regulated by statute.

So far as stocks and bonds are concerned the whole question has been put at rest in Pennsylvania by a recent act of assembly, which provides that, "It shall not be lawful for any person or persons, bank, savings fund, building association, or any corporation to pledge or rehypothecate any stocks, bonds or other securities

[1] Halliday *v.* Holgate, L. R. 3 Ex. 299.
[2] 3 Otto 321; Lewis *v.* Mott, 36 N. Y. 395.

received by any of them for money lent or borrowed during the continuance of the contract of hypothecation or pledging of such securities; and any such repledging or rehypothecation, without the consent of the party pledging the same, is hereby declared a misdemeanor, liable in the Courts of Quarter Sessions, and on conviction thereof, any person or persons, or the officers of any corporation violating the provisions of this act shall be sentenced to a fine of not less than five hundred nor more than five thousand dollars, and undergo imprisonment for a period not exceeding five years, or both, or either, at the discretion of the court before which such person shall be prosecuted.[1] This is a highly penal statute, but has not as yet been enforced. How far under it the custom of a particular class of traders generally understood to repledge will be construed as raising an implied consent on the part of the pledgor remains to be decided. It would be idle to speculate upon the judicial interpretation of a statute, and especially one of this character, but being in derogation of the common law as laid down in Thompson *v.* Patrick,[2] it would, according to general rules of interpretation, be likely to receive a strict construction.

[1] Act May 25, 1878, Pur. Dig. 2107.

[2] 4 W. 414.

NOTE.—It is no part of this essay to criticise the law, but rather to state what the law is as the writer finds it. Yet the absurdity of the Act of 1878 is too patent to be overlooked. Whatever may be said of the evil results of sub-pledging, it could never be other than a *malum prohibitum*, and this practice which has always existed in Pennsylvania under sanction of law, is now made punishable with twice the severity of bigamy, and far more severely than either larceny or counterfeiting.

CHAPTER IX.

Sale of Pledges.

If there be a default in payment of the principal debt, the pledgee's remedy is to sell the pledge. Such a sale may be made in one of two ways:

1. By bill in equity or judicial sale, under a decree of foreclosure.

2. Sale without judicial process upon demand and reasonable notice.

If there is no stipulated time for the payment of the debt, but the pledge is for an indefinite period, the pledgee has a right upon request to insist upon a prompt fulfillment of the engagement, and if the pledgor neglects or refuses to comply, the pledgee may, upon due demand and notice to the pledgor, require the pledge to be sold.[1] Where a certificate has been delivered as a pledge without any transfer or power to make a transfer, a bill in equity seems necessary before a sale can take place.[2] A court of equity will look upon a transfer as made which ought to be made, and will decree a sale and application of the proceeds to the payment of the loans.[3]

At common law in the time of Glanville a judicial process was required before a pledge could be sold.

[1] Story on Bailments, Par. 308.

[2] Robinson *v.* Hurley, 11 Iowa 410.

[3] Johnson *v.* Dexter, 2 McArthur 530.

The law as at present established, says Story, leaves an election to the pledgee. He may file a bill in equity against the pledgor for a foreclosure and sale,[1] or he may proceed to sell *ex mero motu* upon giving due notice of his intention to the pledgee.[2] Until the actual sale has taken place there exists in the pledgor a right of redemption upon payment of debt and interest, and hence reasonable notice of the time and place of sale is necessary before a valid sale can take place.[3] What is reasonable notice is sometimes a difficult question. In Md. Fire Ins. Co. *v.* Dalrymple,[4] a week's notice was considered reasonable, and in New York two days has been considered enough.[5] In Vose *v.* Florida R. R.,[6] the parties had agreed on five days' notice beforehand. So a joint owner is entitled to notice.[7]

It is entirely within the option of the pledgee, after default in payment of the principal debt, at what time he will sell the pledge, and hence should he keep the stock for a long period, until it had materially depreciated in value, the pledgor would have no legal ground for complaint, as the presumption is that the

[1] Smith *v.* Coale, 34 Leg. Int. 58; Briggs *v.* Oliver, 68 N. Y. 336.

[2] Story on Bailments, Par. 310

[3] Neiler *v.* Kelly, 69 Pa. 403; Markham *v.* Jaudon, 41 N. Y. 235; Stearns *v.* Marsh, 4 Denio, 227; Davis *v.* Funk, 39 Pa. 243; Cushman *v.* Hayes, 46 Ill. 145; Conyngham's Ap., 57 Pa. 474.

[4] 25 Md. 242.

[5] Willoughby *v.* Comstock, 3 Hill 389; Bryan *v.* Baldwin, 7 Lansing 174.

[6] 50 N. Y. 369.

[7] Clark *v.* Sparhawk, 2 W. N. 115.

pledgee is retaining the pledge in order to give the pledgor a further opportunity to redeem.[1]

As a corollary to this proposition a demand must be made upon the pledgor for payment of the debt, and he must be given a reasonable opportunity of doing so.[2]

It has been held further that an agreement by the pledgor that the pledge shall become the property of the creditor on a failure to pay the debt secured is illegal; the creditor is not allowed to stipulate for a forfeiture.[3]

A demand for payment and notice of sale may be given at the same time; and it has been decided in Massachusetts that notice of an intention to foreclose is equivalent to a demand.[4]

As steps prerequisite to a sale, however, they are not to be confounded, the object of a demand is to prevent a sale by rendering it unnecessary; and the object of a notice is to enable the debtor to take proper measures to insure a fair sale. Both must be reasonable in point of time.[5]

It was at one time held that a waiver of notice was illegal because a man could no more agree to waive a

[1] O'Neill *v.* Whigham, 6 Norris 394; Rozet *v.* McClellan, 48 Ill. 345; Taggard *v.* Centenius, 15 Wendell 155; Lawrence *v.* Maxwell, 53 N. Y. 19; Fisher *v.* Fisher, 98 Mass. 303; Robinson *v.* Hurley, 11 Iowa 410; Smouse *v.* Bail, 1 Grant 397.

[2] Wilson *v.* Little, 2 N. Y. 443.

[3] Edwards on Bailments, Par. 283 and cases cited.

[4] Howe *v.* Bemis, 2 Gray 203.

[5] Edwards on Bailments Par. 285 and cases cited.

notice of the sale of his pledge than he could his equity of redemption, which is what it practically amounts to.[1]

But the better opinion is now the other way as will be presently shown.

A third ingredient of a valid sale of a pledge at common law, was that it must be public. The object of this provision is apparent, namely: That the article might bring its best price. It was urged, however, before the New York courts at an early day, that when stocks and bonds were pledged as collateral and sold for non-payment of the debt secured, that the Board of Brokers was really the most favorable place for a sale, being the accustomed market for those classes of securities, and that accordingly a better price would be realized. The court, however, was loth to depart from the old and well established principle and said that the Board of Brokers was an association of dealers in stocks and not open to the public. None but members are allowed to be present at the meeting except upon invitation; that a fair chance was not given to all the world to compete, and the sale could not be sustained.[2]

The New York courts have held that the sale of

[1] Campbell *v.* Parker, 9 Bosw. 322; Gilpin *v.* Howell, 5 Penna. 41; Hanks *v.* Drake, 49 Barb. 186; Sterling *v.* Jaudon, 48 Barb. 459; Wilson *v.* Little, 2 N. Y. 443, 448.

[2] Rankin *v.* McCullough, 12 Barb. 103, 107; Brass *v.* Worth, 40 Barb. 648, 652; Markham *v.* Jaudon, 41 N. Y. 244.

stock by the pledgee must be made at the Merchants' Exchange at public auction.[1]

The necessary expenses of a sale of a pledge are to be met by the pledgor.[2]

It became apparent, however, to the dealers in securities that if formal demand, notice and public sale were necessary in the case of every pledge, it would tend materially to cramp the legitimate business of the broker acting in the capacity of pledgee, and more especially perhaps in cases where a small percentage of the par value of the stock was deposited with brokers, who agree to carry the stock, which as we have seen creates the relation of pledgor and pledgee between customer and broker.[3] Hence the custom arose on short loans of taking from the borrower his note, accompanied with stocks or bonds as collateral, with authority to sell the same at the Board of Brokers at public or private sale, or otherwise, at the option of the broker, on the non-payment of the note without notice and in some cases without demand;[4] and the English courts have held that such an authority inserted in the note does not deprive it of its negotiable character.[5]

The courts have of late been disposed to give effect

[1] Brown *v.* Ward, 3 Duer 660.

[2] Blake *v.* Paul, 29 Leg. Int. 366.

[3] Markham *v.* Jaudon, Supra.; Baker *v.* Drake, 66 N. Y. 518; Cushman *v.* Jewelry Co., 76 N. Y. 365.

[4] Edwards on Bailments, 284.

[5] Fancourt *v.* Thorn, 9 Q. B. 312.

to any agreements of waiver.[1] This may be best illustrated by an example. Baker *v.* Drake[2] was an action brought for an alleged conversion of 500 shares of the stock of the Chicago & Alton R. R. Plaintiff sent a letter to defendants (stock brokers) as follows: "Gentlemen: You are hereby authorized to negotiate for my account such transactions in stocks and other securities as Mr. U. F. Rogers may think best to direct. All transactions under his directions will be duly acknowledged and confirmed, and in every way subject to the usages of your office." Prior to this defendants had bought on plaintiff's account 500 shares of C. & A. R. R. The stock having declined, and plaintiff having failed to furnish additional margin, defendants sold the stock at a loss at the Stock Exchange, without giving plaintiff any notice of the time or place of sale. At the trial of the cause, counsel for defendants offered to prove that in 1868, from the first of January to the first of December, there was a custom in their mode of doing business in cases of the sales of stock of customers purchased under circumstances similar to this, when a sale was made on account of the margin being insufficient by reason of a failure to furnish sufficient margin, and that by that custom the stock was sold at the Stock Exchange in

[1] Wheeler *v.* Newbould, 16 N. Y. 392; Milliken *v.* Dehon, 27 N. Y. 364; Stevens *v.* Hurlbut Bank, 31 Conn. 146; Hyatt *v.* Argenti, 3 Cal. 151; Davis *v.* Funk, 39 Pa. 243; Stenton *v.* Jerome, 54 N. Y. 480; Wicks *v.* Hatch, 62 N. Y. 535.

[2] 66 N. Y. 518.

New York, and no notice was given to the customer of the time or place of sale. This was objected to, and the offer was refused, which was assigned for error. In the opinion of the Court of Appeals, Folger, J., said, *inter alia:* "The defendants offered in evidence an instrument in writing, signed by the plaintiff. It was received without objection. By it the plaintiff agreed that all transactions in stocks, under the direction of Rogers should be in every way subject to the usages of the defendant's office. The last clause of this instrument was not unmeaning and useless. It was of some import. It was part of the plaintiff's agreement. The word 'usages' meant the habits, mode and course of dealing in the office of the defendant. If instead of this word, those habits, mode and course of dealing had been set forth at length in the instrument, would not the transactions of the plaintiff and defendants in stocks, under the directions of Rogers, have been subject to them, subject to the rules of law? As they were not so set forth, the word 'usages' alone does not convey the full meaning of the parties to the instrument, and a court may not from a perusal of the paper know all that was in their contemplation. There is need of parol proof to enable the word used by them to convey the full meaning with which they meant to charge it, and parol proof is competent therefor. If parol proof should show that it was a usage of the defendant's office for want of margin to sell stocks in pledge at the public board of brokers, without notice to the pledgor of the time

and place of sale, would it not tend to establish an agreement by the plaintiff that the same course might be taken in his case; to so agree would not have contravened any statute nor infringed upon public policy, and it might not have been fraudulent." The judgment was accordingly reversed.

And in another case, where, in a marginal transaction, the defendants (the brokers) were authorized by plaintiff "to sell in their discretion at public or private sale, and without notice to me or any notice whatever, the stocks, bonds or gold which they are or may hereafter be carrying for me whenever my margin shall fall below five per cent."

It was adjudged that the defendants were authorized to sell at the board of brokers without notice when in good faith and in the exercise of a sound discretion they deemed the state of the market justified it; that the plaintiff was liable for any loss on sales beyond the amount of the margin, and that the same was proper as a counter claim.[1]

From the cases cited and discussed, two general principles as to the sale of pledges may be said to result:

1. That the pledgor is entitled to demand a reasonable notice before a sale can be made, and that such sale must be public.

2. That the pledgor may waive any or all of these privileges, and that such a waiver will be sustained.

[1] Wicks *v.* Hatch, 62 N. Y. 535.

To which a third might be added, viz.: That where the pledgor expressly agrees to be bound by any "usages," it is competent for the pledgee to offer parol evidence as to the character of such usages.

CHAPTER X.

SPECIFIC PERFORMANCE.

WE pass on now to the consideration of the Equitable remedy of Specific Performance, as affecting contracts for the sale and delivery of stock. The general rule is that pecuniary damages are the proper remedy for broken contracts, and it is only when the ascertainment of such damage is either impossible or wholly impracticable, that equity steps in to afford adequate relief. The necessity of having some remedy other than that afforded by the common law was early felt, and hence we find that this very relief of specific performance was one of the earliest administered by the Chancellor.[1]

The time at which this jurisdiction began is a matter of historical interest purely, and has no place in this essay, suffice it to say that no matter when the jurisdiction attached, it is now very clear that if a contract concerning land has been entered into by competent parties and is in its nature and circumstances unobjectionable, it is as much of course in a court of equity to decree a specific performance, as it is to give damages at law.[2]

This statement must however be taken with the im-

[1] Year Book, 8 Edw. IV, 4 B., Maddock's Chancery 361.

[2] Hall *v.* Warren, 9 Vesey 608.

portant qualification, that the application of this remedy is one that rests in the sound discretion of the Chancellor.[1]

The whole rationale of the remedy is "that a court of law is inadequate to decree a specific performance, and can relieve the injured party only by a compensation in damages, which in many cases would fall far short of the redress which his situation might require. Whenever, therefore, the party wants the thing in specie, and cannot otherwise be fully compensated, courts of equity will grant him a specific performance."[2]

Contracts for the sale of realty have come within the scope of this remedy, more frequently than those for the sale of personalty. It is well settled that the reason for this is not to be found in any inherent distinction between the two classes of property, but rather because pecuniary damages are more likely to afford a complete compensation in personal contracts than in real.[3]

The mere fact then, that a contract is personal, is no ground *per se* for the refusal of a court of equity to take cognizance of it, and apply this remedy. We must not fail to note in this connection, that the relief granted by a Chancellor has been frequently obtained in cases where unique articles have been tortiously

[1] Clowes *v.* Higginson, 1 V. & B. 527.

[2] Story's Eq. 716; Bettesworth *v.* Dean of St. Paul, Sel. Cas. in Ch. 68; Harnett *v.* Yielding, 2 Sch. & Lefr. 553; Cathcart *v.* Robinson, 5 Peters 264; Sugden on Vendors, 7 Ed. 190.

[3] Adderley *v.* Dixon, 1 Sim. and Stu. 607; Cud *v.* Rudder, 1 P. Wms. 570; Deane *v.* Izard, and Hollis *v.* Edwards, 1 Vern. 159.

withheld from their rightful owners. The Pusey Horn and the Altar Piece of the Percys are familiar illustrations of this rule.[1] So in Falcke *v.* Gray,[2] two ancient china jars which were so nearly unique that it was impossible to arrive at their true value. And in more modern times the instruments, plans, etc., of a surveyor, which were withheld from him by a clerk in his employment.[3]

So much for the general outline of specific performance. We must now consider the application of the remedy to contracts for the purchase and sale of stocks. In doing this it will be well to begin with the leading case, which happens to be the oldest, and making this a starting point, see how far subsequent cases have altered the law as first declared a century and a half ago. Cud *v.* Rutter is familiar. Defendant had agreed to transfer to plaintiff on a certain day some South Sea stock, at a specified rate. In the memorandum defendant had inserted "or pay the difference," which the plaintiff struck out, and then the defendant signed it. After the bargain was made the stock rose considerably in value, and the defendant refused to deliver, but offered to pay the difference, which the plaintiff refused to accept, and brought a bill for specific performance. The Master of the Rolls could see no reason why the agreement should not be enforced, especially since it

[1] 1 Vern. 270, 3 P. Wms. 389.

[2] 5 Jurist, N. S. 645.

[3] McGowin *v.* Remington, 2 Jones Pa. 56; Gough *v.* Crane, 3 Md. Ch. 119.

was expressly stipulated by the plaintiff, that he should have the stock, and not the difference. The Lord Chancellor, however, took an entirely different view of the matter, and held that one thousand pounds of such stock was exactly like another thousand, and provided the difference was paid, no harm could result. "This sort of contracts are commonly understood to mean no more than to transfer the stock or pay the difference, and this fully answers the intentions of the parties; for the injured one may buy of any other person and be no more money out of pocket than if the stock were delivered to him according to the agreement. This differs very much from the case of a contract for lands, some lands being more valuable than others, or at least more convenient than others, to the purchaser, but there is no difference in stock. One man's stock is of equal benefit and conveniency as another's. Secondly, in contracts for stock being subject to sudden rise and fall, the day is the most material part of the contract, and therefore not proper for a court of equity to carry into execution; the decree might be beneficial to the plaintiff one day, and to his prejudice the next." So the bill was dismissed.[1]

In a case which arose a few years later (1723) the same conclusion was reached, and the court said with relation to contracts for South Sea stock: 1. That if a contract be executed, a court of equity will not un-

[1] Cud *v.* Rutter, 1 P. Wms. 570.

ravel or break into it. 2. If it only be executory, and a man comes to have it carried into execution, there a court of equity will not aid the plaintiff, but leave him to such a remedy as he can have by law,[1] and this rule has been well settled in England ever since.[2]

But in Doloret *v.* Rothschild,[3] the Vice-chancellor held that, inasmuch as the bill prays for a delivery of the certificates which would constitute the plaintiff the proprietor of a certain quantity of stock, it will hold because a court of law could not give the property, but only a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party, and inasmuch as the plaintiff was not the original holder of the scrip, but merely the bearer, he might not be able to maintain any action at law upon the contract, and if he had any title, it must be in equity. The stock in this case was government security, known as Neopolitan Rentes.

With reference to shares, the difference between which and stock has already been explained, we find a different rule prevailing. The distinction seems first to have been noticed in Duncuft *v.* Albrecht.[4] In this case there was a contract for the sale of certain shares in the London and Southampton Railway. It was argued on the authority of the cases just cited, that the plaintiff's only remedy was at law, but the Vice-Chan-

[1] Cappur *v.* Harris, Bunb. 135.

[2] Nutbrown *v.* Thornton, 10 Vesey 160; Shaw *v.* Fisher, 5 DeG. M. & G. 596.

[3] 1 Sim. and Stu. 590.

[4] 12 Simons 189.

cellor said that the only question was whether there has been any decision, from whence a conclusion could be extracted, that the court would not decree a specific performance of an agreement for the sale of such shares. "Now I agree," said the Chancellor, "that it has long since been decided that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. But in my opinion there is not any sort of analogy between a quantity of three per cents, or any other stock of that description, which is always to be had by any one who chooses to apply for it in the market, and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had in the market. And as no decision has been produced to the contrary, my opinion is that they are a subject with respect to which an agreement may be made which this court will enforce." And this was subsequently affirmed by the Lord Chancellor.[1] And the courts have gone so far as to say, they will specifically enforce a contract for the sale of shares in a joint stock association, although there was a provision in the deed of settlement that no shareholder should be at liberty to transfer his shares except in such a manner as the board of directors should approve.

[1] Shaw *v.* Fisher, 5 DeG. M. & G. 596; Wynne *v.* Price, 3 DeG. & Sm. 310; Wilson *v.* Keating, 7 W. R. 484; Cheale *v.* Kenward, 3 DeG. & S. 27; Oriental Co. *v.* Briggs, 2 J. & H. 625; Paine *v.* Hutchinson, L. R. 3 Eq. 257; Shepherd *v.* Gillespie, L. R. 5 Eq. 293.

In Poole *v.* Middleton[1] and in Bermingham *v.* Sheridan,[2] the principle was recognized, although owing to the peculiar circumstances of the case, was not enforced. In Robinson *v.* Chartered Bank,[3] the Master of the Rolls held that in such a case the company must exercise its power reasonably, and consequently a refusal to make any transfer at all to anybody would not be a reasonable answer.[4] Some cases can be found in which the English courts have refused to decree specific performance of contracts of this nature, but an examination will show that the principal of enforcement runs through them all, and that the reason the relief has been refused was attributable to some defect either in the form or equity of the bill.[5]

It has not been thought necessary to enter into the nice refinements of the English cases upon this subject, because the cumbersome method of stock dealing in that country is of little interest and less utility on this side of the water. It must be borne in mind that the companies in which contracts for the transfer of shares have been specifically enforced, are not corporations regulated like our great railway companies for example, but partake more of the nature of joint stock associations, or partnerships, where there is in many cases an unlimited liability incurred by each stockholder. Their incorporation is provided for by nu-

[1] 29 Beav. 646.

[2] 33 Beav. 660.

[3] L. R. 1 Eq. 32.

[4] Evans *v.* Wood, L. R. 5 Eq. 9.

[5] Gas Co. *v.* Harrison, 17 Beav. 294; Harris *v.* North Devon Railroad, 20 Beav. 384; Hawkins *v.* Maltby, L. R. 6 Eq. 505; Emerson's Case, L. R. 1 Ch. 433.

merous acts of Parliament, the principal of which is the Companies' Act of 1862, which forms a basis for the foundation of most of the modern English corporations and joint stock associations.

The transfer of shares is generally attended with difficulty, and our easy method is practically unknown. Hence it can be very readily understood that the English decisions upon this subject have a very questionable value in this country. The analogy would seem to be more perfect between our corporation stock and the English Government Stock. By this I do not mean that there exists no reason why stock contracts should ever be enforced in specie, but that the strong reasons which seem to render it essential, on the other side of the water, do not apply with equal force on this. If we turn now to the decisions of the American courts, two points strike us at the outset as remarkable.

First that so few cases have arisen on the point, and second that among these there should be such a wide divergence of opinion. It will be best, perhaps, to look first at the cases in which the point has fairly arisen, and afterwards give some attention to the dicta running through the cases wherein the question has come up collaterally. In Austin *v.* Gillaspie,[1] A had agreed conditionally to subscribe to a certain quantity of stock in a railroad company, and B and C agreed

[1] 1 Jones, Eq. 261.

with him in writing, that if he agreed to do so unconditionally they would each take one-fourth of the stock off his hands by subscribing for it in their own names, and A accordingly made the subscription absolutely. It was argued on the trial that the contract being one for the transfer of stock in a public company, for the breach of which the plaintiff had his remedy at law, that it was not such a contract as would entitle him to relief in equity. But the court replied by saying that this objection might have some force if it were applied to a contract for the sale of stock in a company already in existence, and whose stock had in market a certain or nearly certain value, but when, as in the present case, the railroad company was just struggling into life, and the subscribers for its stock were taking upon themselves very heavy burdens with but small prospect of future advantage, it would be impossible to give the plaintiff at law damages at all commensurate with the injury sustained. In Pennsylvania equitable relief has been refused to a company, against parties who had subscribed to the stock of a railroad, and had neglected to fill their engagements.[1]

In Ashe *v.* Johnson's Administrator,[2] the court said in replying to the same argument as had been advanced in Austin *v.* Gillaspie, that it might be so in reference to government stock in England, which like corn or flour may be bought in the market at any time, but the doctrine has no application to railroad stock.

[1] Strasburg R. R. *v.* Echternacht, 9 H. 220.

[2] 2 Jones Eq. 149.

This, it will be observed, was a step in advance of the other case. In Leach *v.* Fobes,[1] the court seemed to lean strongly toward the doctrine that performance in specie would be decreed of a contract for the transfer of shares in joint stock companies or corporations, in cases in which it appears that the capital stock is fixed at a certain amount, and the number of shares is limited. But as the contract in question called for the sale and conveyance of real estate, as well as the transfer of shares, the same being the result of a family compromise under a disputed will, the court enforced the whole agreement, "without deciding whether a suit in equity can be supported for the sole purpose of enforcing a contract for the sale of shares in the corporation."[2]

The case of Treasurer *v.* Commercial Mining Co.[3] is an instructive one. It was an action to compel the defendants, a corporation, to issue to the plaintiff a certificate of forty-six shares of the capital stock. It appeared that the plaintiff, with others, located and took up a coal mining claim; that his colocators, with others, formed the corporation defendant, for the purpose of mining coal, with twenty-five hundred shares of capital stock. The plaintiff and his colocators delivered the possession of their claim to the corporation, who took possession. In consideration thereof the defendants agreed to issue to the plaintiff one-sixth of the capital stock. But a portion had been delivered, and the bill prayed for the delivery of the resi-

[1] 11 Gray 506. [2] Todd *v.* Taft, 7 Allen 371. [3] 23 Cal. 391.

due. The court thought that while it was a general rule that an agreement for the transfer of stock will not be enforced, still that such a rule applied only to public stocks, and that "in the peculiar condition of business and mining operations in this state, where numerous mining and other corporations are in existence, whose stock is often of fluctuating and uncertain value, and where certain kinds of stock have a peculiar value to those acquainted with their affairs, where the market value of the stocks, if any they have, is often difficult to substantiate by competent evidence, and where the risk of the personal responsibility of individuals and corporations is so great, courts should be liberal in extending the full, adequate, and complete relief afforded by a decree of specific performance." And in a recent case in Kentucky, where the state owned a quantity of turnpike stock which the legislature ordered the commissioners of the sinking fund to sell after due notice, etc. The plaintiff having bid highest, was presented by the commissioners with the conditions of sale, which were accepted by him, and he so notified the commissioners. The legislature subsequently repealed the act which ordered the sale, and the commissioners refused to execute the transfer. This was held to be impairing the obligation of the contract, and the defendants were ordered to execute the transfer, not one word being said in the course of a very lenghty opinion about pecuniary damages.[1]

[1] Baldwin *v.* Commonwealth, 11 W. Bush 417.

Obiter Dicta will be found in Brown *v.* Gilliland,[1] Phillips *v.* Berger,[2] Sullivan *v.* Tuck,[3] Waters *v.* Howard,[4] Carpenter *v.* Insurance Co.[5]

Ross *v.* Union Pacific R. R. disclosed the following state of facts. Plaintiff was a contractor employed to build the Eastern Division of the Union Pacific R. R. The company agreed to pay for the road as each section of forty miles was completed, payment to be made in U. S. bonds, and the bonds and stock of the company. The plaintiff entered upon the execution of his contract, and expended considerable money upon the same. Some eight months after, the company executed a deed of trust, which conveyed to the trustees all the line of railroad built, and to be built, to secure certain bonds. The deed of trust completely disposed of all the assets and conveyed away all the security which plaintiff had for the building of the road. The object of the bill was to enjoin the issue of the bonds under the deed of trust, and for a decree compelling the specific performance of the contract. The case was argued before Mr. Justice Miller on the Eighth Circuit. In his opinion, the judge disposes of the United States bonds by saying they are stock within any meaning to which you may attach that term, and that the decisions that a covenant for their delivery will not be specifically enforced are clear and uniform. As to the shares in the railroad, the court said that it could see no sound reason for any distinction

[1] 3 Dessau 539. [2] 2 Barb. 608, 8 id. 527. [3] 1 Md. Ch. 59.
[4] 1 Md. Ch. 112. [5] 4 Sandf. Ch. 408.

between them and government stocks. "They belong to a class of securities which are generally called stocks, they are the subject of every day sale in the market, and the rates at which they are selling are quoted in the public commercial reports, so that their value is as readily and certainly ascertained as that of government stocks. No especial value attaches to one share over another, and the money which will pay for one will as readily purchase another. The damages must be awarded at law." The court, after noting the distinction taken in England between government and other stock adds, "whether the distinction taken in these cases shall be held finally to prevail in this country I need not now determine." The case was really decided on another point, and the utterances of the judge do not rise above dicta, but coming from Justice Miller are entitled to much weight.[1]

Where a trust has been created in relation to stock or any other chattel, there is no doubt that a bill in equity will lie to enforce the trust, and have a transfer of the property.[2] And in Mechanics Bank *v.* Seton,[3] where bank stock was held by a trustee, equity interfered for the purpose of defeating an attempt to set up a lien opposed to the trust, for a loan made to the trustee, with full notice of his fiduciary character, by

[1] Ross *v.* Union Pacific R. R., Woolworth C. C. Rep. 26; Fallon *v.* R. R., 1 Dillon 121; Cushman *v.* Jewelry Co., 31 Sick. 365.

[2] Ferguson *v.* Paschall, 11 Mo. 267; Cowles *v.* Whitman, 10 Conn. 121; Clark *v.* Flint, 22 Pick. 231.

[3] 2 Peters 299.

compelling the bank to allow a transfer of the stock to the *cestui que trust* or those claiming under him. The late case of Foll's Ap.,[1] decided in November, 1879, was a bill brought for the specific performance of a contract for the transfer of fifteen shares of bank stock, which the complainant desired to obtain in order to gain a controlling interest in a bank in Erie county. There was no stock in the market, and none could be purchased. The bill was dismissed as against public policy. Paxson, J., in his opinion, recognizes the rule that for the breach of a contract of sale of personal chattels, there is an adequate remedy at law, and a jury can be in no doubt as to the proper measure of damages; that this is especially true of stocks and public securities which have a known market value. The disappointed purchaser can go into the market and purchase a corresponding number of shares of the same stock "I know of no instance," says the judge, "in this state, in which a court of equity has decreed specific performance of a sale of stock." The leading cases upon this subject in England and in the United States have now been considered.

The decisions in the former country are uniform, and the law well settled, while in the latter it seems much confused. I would however submit, with great deference, that the weight of authority seems overwhelmingly in favor of compensating by damages, broken contracts for the sale or transfer of stock. If, however,

[1] 36 Leg. Int. 495.

the stock were very scarce, it does not seem to me that under any of our decisions specific performance would necessarily be denied, but that the *prima facies* is decidedly against it, and it must be proved to the satisfaction of the Chancellor that any other remedy would be totally inadequate, before he will interpose. I may be permitted to close this section with the pertinent remark of Justice Story, "that there can be no reasonable objection to allowing the party who is injured by the breach, to have an election either to take damages at law or to have a specific performance in equity. The courts have not yet gone that length, but when they do, they will relieve the subject of specific performance of many of its embarrassments, and remove from this branch of equity jurisprudence, many of the artificial distinctions, to which the courts have been compelled to have recourse in order to justify their advance toward such a sound general rule."

CHAPTER XI.

MEASURE OF DAMAGES.

THERE are obviously two kinds of remedial relief which may be granted by a court. Specific, which has just been considered, and pecuniary remuneration, or damages, which it is proposed now to discuss.

We have seen that equity rarely comes in to enforce personal contracts specifically, and further, that the reason for this is not to be found in any inherent distinction between real and personal contracts, but rather because in the latter case, damages afford an adequate, although perhaps not always complete remedy, while in the former, substantial justice cannot be done, unless the parties are placed by the court in exactly the position they agreed to place themselves by the terms of their contract. We have also seen that in accordance with the general rule just stated, contracts for the sale of stock are rarely enforced in specie, but the party aggrieved is thrown back to his common law remedy for damages, and the standard by which such damages are measured will furnish the subject of this chapter.

Before coming to the application of the principles which regulate the quantum of damages in actions upon stock contracts, it will be necessary to advert for a moment to the general theory of damages. "By the common law," says Mr. Sedgwick, "in all cases of civil injury or breach of contract, with the exception of those cases of trespasses or torts, accompanied by

oppression, fraud, malice, or negligence so gross as to raise a presumption of malice, where the jury have a discretion to award exemplary or vindictive damages, in all other cases the declared object is to give compensation to the party injured for the actual loss sustained."[1] This compensation is furnished in the damages which are awarded according to established rules, and these rules form what is called the Measure of Damages.[2] This idea of compensation we find running through all systems of jurisprudence, from the very earliest times, and the methods employed in both rude and refined codes to arrive at an accurate standard for measuring damages are curious and interesting. They vary all the way from arbitrary rules, prescribing a fixed compensation for every offence, irrespective of the circumstances of the case, to the very lax system in vogue in England a century or more ago, of leaving the whole question to the discretion or indiscretion of the jury. But with the growth of civilization and of law, different standards of damages have been assigned to different classes of cases, and the law of damages has come to be, with its many subtle refinements, a very important and intricate department of our law. While the idea of compensation is the pole star for the courts, "it would be going a great way," said Chief Justice Marshall, "to subject a debtor who promises to pay a debt to all the loss consequent on his failure to fulfil

[1] Smith *v.* Sherwood, 2 Texas 460.

[2] Sedgwick on Measure of Damages, 34.

his promise. The general policy of the law does not admit of such strictness, and although in morals a man may justly charge himself as the cause of any loss occasioned by the breach of his engagement, yet, in the course of human affairs, such breaches are so often occasioned by events which were unforseen, and could not easily be prevented, that interest is generally considered as compensation which must content the injured."[1] While the opinion of the Chief Justice is undoubtedly correct as to the class of cases which he had in mind, it is obvious that it could have no application when contracts for the delivery of articles of fluctuating value are broken, or property of this nature is tortiously withheld from its true owner. The question of the proper compensation in such cases becomes difficult to ascertain, and is in many instances very perplexing. It is with this very class of cases, or rather with one division of it that we are now concerned, and that of an article liable to more sudden and wider fluctuations than any other commodity.

It is a well settled rule of law, that in case of conversion of property of a fixed value, the quantum of damages is the amount of this value, together with interest from time of conversion to the close of the trial.[2]

[1] Short *v.* Skipwith, 1 Brock 103.

[2] Andrews *v.* Durant, 18 N. Y. 496; McCormick *v.* R. R., 49 N. Y. 303; King *v.* Orser, 4 Duer 431; Robinson *v.* Hartridge, 13 Fla. 501; Tenney *v.* Bank, 20 Wis. 152; Hurd *v.* Hubbell. 26 Conn. 389; Vaughan *v.* Webster, 5 Harr. 256; Thrall *v.* Lathrop, 30 Vt. 307; Yater *v.* Mullen, 24 Ind. 277; Polk *v.* Allen, 19 Mo. 467; Ryburn *v.* Pryor, 14 Ark. 505; Cutter *v.* Fanning, 2 Iowa 580; Hayden *v.* Bartlett, 35 Me. 203; Ripley *v.* Davis, 15 Mich. 75.

But the question must now be considered with reference to articles of fluctuating value, and as has just been said of that article whose value is most erratic. The decisions upon this subject, which in default of a better name is known as the doctrine of intermediate higher value, we shall find very conflicting. Our only recourse therefore is to consider the cases, and try to gather from them some general principles.

It is not a little remarkable that the subject has never claimed the attention of the English courts to any great extent. If we classify the matter under three heads, we shall more readily understand the law in that country; 1. Actions for failure to replace stock, 2. Actions for failure to deliver where the consideration has passed, and 3. Actions for failure to deliver where no consideration has passed.

Forrest *v.* Elwes[1] arose under the first division. It was a transfer of stock by way of a loan upon a bond conditioned to replace the stock six months after date. The obligor failed to replace, and the stock depreciated in value. He was held liable for the value at the time of transfer, with interest down to the trial. The same was held in Sanders *v.* Kentish[2] which was decided the same year. In a case which arose some years later under the same circumstances, but where the stock had risen in value, the plaintiff was allowed to recover the value on the day of trial, because this was the only method of indemnifying him.[3] But the notion of the

[1] 4 Vesey, 492.

[2] 8 T. R., 162.

[3] Shepherd *v.* Johnson, 2 East 211; Downes *v.* Back, 2 E. C. L. R. 407; Harrison *v.* Harrison, 1 C. & P. 412.

highest value between the breach and trial was repudiated at an early day.[1]

Greening *v.* Wilkinson[2] has sometimes been cited as countenancing the highest value rule, but a perusal of the case will show that the only point decided, was that in trover the jury are not limited to the mere value of the property at the time of conversion.

The rule as laid down in the early cases was followed in Owen *v.* Routh,[3] and the true measure of damages held to be in an action for not redelivering shares borrowed on the day agreed upon, the value at the date of trial.

As to the second class the rule seems to be analagous to the first, because a moment's consideration will show that in principle the cases cannot be distinguished. At least such would seem to be the inference to be drawn from the decisions;[4] although I am not aware that a case has ever risen directly on the point.

In the third division we find a very clear opinion by Baron Parke, in Shaw *v.* Holland. The distinction is taken between an action for not replacing stock and an action for non-delivery on a given day, because in the former case the borrower has in his hands the money of the lender, whereas in the latter, on failure to deliver the lender can go into the market,

[1] McArthur *v.* Seaforth, 2 Taunton 257.

[2] 11 E. C. L. R., 499.

[3] 78 E. C. L. R. 326.

[4] Gainsford *v.* Carroll, 9 E. C. L. R. 204, and Shaw *v.* Holland, 15 M. & W. 136.

and buy other shares, charging the defendant with the difference, so that upon a breach of contract for the sale of shares, the proper measure of damages is the difference between the contract price, and the market price at the time of breach.[1]

The English law may be summed up as follows:

1. In actions for failure to replace borrowed stock or for failure to deliver stock when the consideration has been paid, the measure of damages where the stock has risen in value, is the value at the day of trial. Where it has fallen, it is probably the value at the time of breach.
2. When the consideration has not passed, the measure of damages is the difference between the contract price and the market price at the time of breach.

It is proposed now to investigate the decisions upon the law of damages as applied to stocks in the United States. Beginning with New York which seems most prolific in this kind of law, let us look at the cases in their chronological order. In Cortelyou *v.* Lansing[2] decided in 1805, which was an action of trover against a pawnee for the sale of a depreciation note, the question was as to the measure of damages. The court per Kent, J., cited with approval, Shepherd *v.* Johnson, and thought it was just and right that the plaintiff should recover the value of the note at the time he chose to demand it, as no other measure of damages

[1] Powell *v.* Jessopp, 86 E. C. L. R. 335.

[2] 2 Caines Cases in Error 216.

short of that would indemnify him for the loss of his pledge. This case is valuable only as illustrating that, at a very early day, the principle was distinctly recognized in America, that the damages in trover were not always the value at the time of conversion. In this case the demand had not been made until eleven years after the property had been sold by the pawnee, and the date of the demand was held to be the proper one to assess the damages. West *v.* Wentworth[1] was an action of assumpsit on a note payable in specific articles, and it was decided on the authority of Cortelyou *v.* Lansing and Shepherd *v.* Johnson that the measure of damages was the highest price of those articles at any time between the notes falling due and the time of trial. Clark *v.* Pinney[2] is valuable as containing a very exhaustive review of the law of fluctuating damages up to that time. It was an action of assumpsit on a note for the delivery of salt. It is laid down as a general proposition in this case, based on the English authorities, that in the ordinary case of a contract for the sale and delivery of a personal chattel where the price is not paid at the time of making the contract, but is to be paid upon the delivery of the article, the criterion by which to measure damages for the breach of the contract, is unquestionably the price of the article at the time it was to be delivered. But it was equally clear that if the price be paid at the time of making the contract or at any

[1] 3 Cowen 82.

[2] 7 Cowen 681.

time anterior to that fixed for the delivery and the vendor fails to deliver, the vendee is not confined in measuring his damages to the value of the article on the day when it should have been delivered. The propriety however of giving the vendee in all cases the highest value between the day when the article should have been delivered and the day of trial was doubted, but the suggestion is thrown out that if the action be brought without any unreasonable delay it would seem that any fluctuation in value would be at the defendant's risk, but where the prosecution of the claim is delayed, even though for the purpose of making an amicable arrangement, the rule should be otherwise, and a fair compensation in such a case would be the value at the time of the suit brought. In Kortright *v.* Bank[1] which was an action against the bank for a refusal to permit a transfer of shares upon the books, the highest value between the refusal and the commencement of the suit was awarded, and there is a suggestion by Verplanck S. that this time might have been extended to the day of trial. In alluding to Clark *v.* Pinney, the court said that it was true that the rule laid down in that case related to express contracts of sale, but the reasons apply with equal force to actions in any form, trover, assumpsit, or case, where compensation in damages is claimed for refusal to deliver or illegal conversion of anything, to the property or possession of which the plaintiff is lawfully entitled, and this was followed in Wilson *v.* Mathews.[2]

[1] 22 Wendell, 348.

[2] 24 Barb. 295.

The question came fairly before the courts with relation to stock in the celebrated case of Romaine *v.* Van Allen.[1] The plaintiff had borrowed a large sum from the Bank of Albany, and pledged as collateral several hundred shares of stock. Sometime after, without making any demand or giving any notice to the plaintiff, the bank sold the collateral and soon after failed. Plaintiff presented his claim to the receiver for the highest value which the stock had reached up to the time of such claim, giving notice that should he be compelled to resort to an action, he should claim the highest price down to the time of trial. The claim was disallowed, and the plaintiff brought suit about a week afterward.

The highest market value of the stock between the time of the sale and the commencement of the trial was in round numbers five thousand dollars, but during the trial rose to eight thousand, which amount was awarded the plaintiff by the referee. This was affirmed by the court above, Rosekrans, J., remarking that entirely independent of authority the rule appeared necessary to protect the rights of the owners and pledgors of stock against the tortious act of pledgees, provided the plaintiff begins his action within a reasonable time after conversion, and prosecutes it with reasonable diligence; and the same was held in Allen *v.* Dykers.[2] It would hardly seem, however, that the decision in Romaine *v.* Van Allen follows as a corollary to Clark *v.* Pinney.

[1] 26 N. Y. 309.

[2] 3 Hill 593.

What Sutherland, J., said upon the point under discussion in that cases was at best but dicta, and even then he did not go so far as to endorse unqualifiedly the highest value rule. Looking back over the cases thus far noticed, we have advanced from the dictum of Chancellor Kent in Cortelyou *v.* Lansing, that in trover the measure of damages was not always the value at the time of conversion, with interest, to the decision in Romaine *v.* Van Allen, which awarded the plaintiff more than fifty per cent. in excess of the value of the property at the time of conversion. The rule as laid down in the latter case was followed in Burt *v.* Dutcher,[1] Morgan *v.* Gregg,[2] and Nauman *v.* Caldwell.[3] The question was again very fully considered in Scott *v.* Rogers, which briefly stated was this: The plaintiffs, residing in Cleveland, had wheat in the defendants' warehouse in Buffalo. On July 12, 1853, they telegraphed defendants to sell it that day at so much per bushel, and if it were not sold on that day to ship it to New York. The defendants acting under these orders offered the wheat to a person who asked to be allowed until the next morning to inspect it and decide. To this the defendants assented, provided no news was received from New York affecting the value. He took the wheat the following morning. The sale was made in perfect good faith, but there was obviously a technical conversion by the defendants. The case was twice argued, and the final decision appears

[1] 34 N. Y. 493. [2] 46 Barb. 183. [3] 2 Sweeny 212.

in 31 N. Y. 676. The court thought that it was a rule of doubtful justice to give the plaintiffs the whole period until the statute of limitations would attach for the commencement of their action, to select their standard of price without ever having given notice of their intention to adopt the price of any particular period. A much more just and equitable rule, independent of adjudications would seem to be to allow the plaintiff some reasonable period for fixing upon the price, provided he notifies the adverse party at the time of such act on his part, but never to allow him an unlimited selection, as to the price of which he will avail himself at the trial of the cause. The court, however, admitted that this was not law, and held (on the authority, I suppose, of the decided cases), that the measure of damages is the highest price prevailing between the time of conversion and a reasonable time afterwards for the commencement of the action. But here came in the question as to what was a reasonable time. The court below had fixed upon the 29th of November as the time, which was about four months after the conversion, for the reason that this was the date when canal navigation closed for the winter, and it was fair to suppose that before this the plaintiffs would have sold the wheat. The court above said that they could not pronounce this error, and affirmed the judgment. This decision seems, to say the least, somewhat unique, and has been very severely criticised.

In three cases which came before the Court of Appeals in 1869, where the stocks were carried by the

plaintiff's brokers in certain marginal transactions, the ruling in Romaine *v.* Van Allen was followed Markham *v.* Jaudon,[1] Stillwell *v.* Meigs not reported, Lobdell *v.* Stowell.[2] Romaine *v.* Van Allen was thus the settled law in New York until 1872. In that year, in an action for the conversion of some warehouse receipts for corn, Church, C. J., at the close of his opinion, let fall the dictum that "an unqualified rule giving a plaintiff in all cases of conversion the benefit of the highest price to the time of the trial, cannot be upheld on any sound principle of reason or justice. Nor does the qualification suggested in some of the opinions that the action must be commenced within a reasonable time, and prosecuted with reasonable diligence, relieve it of its objectionable character. Without intending to discuss the question at this time, we deem it proper to say that while the decisions and opinions of our predecessors will receive the utmost respect and consideration, we do not regard the rule referred to so firmly settled by authority as to be beyond the reach of review whenever an occasion shall render it necessary." Not many months elapsed before just such an occasion arose in Baker *v.* Drake.[3] This was a marginal transaction. The plaintiff had failed to keep his margins good, and the stock had been sold by the defendants without notice. After the commencement of the action, and before the trial, the stock underwent alter-

[1] 41 N. Y. 235. [2] 51 N. Y. 70. [3] 53 N. Y. 211.

nate elevation and depression. The jury, in obedience to the instruction of the court, found a verdict for the plaintiff for $18,000, the same being the difference between the average at which the defendants sold and the highest price touched before the trial. More than two-thirds of this so called damage arose after suit was brought. In the opinion of the court above, Rapallo, J., discussed the points involved with great care, taking his cue from the dictum just cited in Matthews *v.* Coe. The judge finds Romaine *v.* Van Allen, Scott *v.* Rogers, Burt *v.* Dutcher, and Markham *v.* Jaudon the stumbling blocks in his way. He explains the first three of these cases away in an ingenious manner, and overrules the latter.

The following brief abstract of Rapallo, J.'s, decision is given by Sedgwick: "The supposition, unsupported by evidence, that the plaintiff who had failed to keep his margin good up to the sale would have continued to supply it during the time necessary to carry the stock to its highest point, and then have been fortunate enough to sell it at the precise point, was an unreasonable one, and that the award of a measure of damages based on such a conjecture was a wide departure from that rule of simple indemnity which should control the damages, except in cases where punitive damages are allowable. The learned judge then pointed out what in such a case would be a proper measure of damages to an aggrieved speculator. As he had not paid for his stocks and did not hold them as an investment, the loss, if any, which he sustained was simply that of the

chance of their subsequent rise in the market, and this chance was accompanied by a corresponding one of their decline, and also, by the further contingency in case of a rise of his not availing himself of it. A continuation of the speculation also required him to supply further margins and involved a risk of ultimate loss.

If, upon being informed of the sale, he desired further to prosecute the adventure, he had a right to disaffirm the sale and require the defendants to replace the stock. If they failed or refused to do this, his remedy was to do it himself, and charge them with the loss reasonably sustained in doing so. The advance in the market price of the stock from the time of the sale up to a reasonable time to replace it, after the plaintiff received notice of the sale, would afford a complete indemnity. Suppose the stock instead of advancing had declined after the sale and the plaintiff had replaced it or had full opportunity to replace it at a lower price, could it be said that he sustained any damage by the sale? Would there be any justice or reason in permitting him to lie by and charge his broker with the result of a rise at some remote subsequent period? Under the rule in Markham *v.* Jaudon, the plaintiff is in a position incomparably superior to that of which he has been deprived. It leaves him relieved both from risk and from the necessity of supplying margin, with his venture out for an indefinite period, limited only by what may be deemed a reasonable time to bring suit and conduct it to its end. Meanwhile obstacles and delays in the progress of the suit are for the interest

of the fortunate suitor, since they extend the period for his retrospective selection of the rate of his own damages. By a thorough examination of the cases it is shown that the reasoning of those decisions which sanction the rule of a higher intermediate value, being founded on the idea that the plaintiff, having been wrongfully deprived of his property or the price agreed to be paid for it, cannot be justly expected to procure it a second time, is necessarily inapplicable to the case of property purchased for speculation, not with his funds, but with the defendant's." The case of Markham *v.* Jaudon is accordingly overruled so far as it relates to the rule of damages.[1]

From the cases which have been considered and decided in the New York courts it seems to me that we are justified in drawing the following conclusions.

1. The rule of damages does not depend upon the form of the action.

2. The question must always be, what is an adequate remedy to the party injured, save only in cases where punitive damages are allowed.

3. That in the action of trover the value of the article at the time of conversion with interest is no longer universally the measure of damages.

[1] Baker *v.* Drake, 53 N. Y. 211; Baker *v.* Drake, 66 N. Y. 518; Thayer *v.* Manly, 73 N. Y. 305.*

* The case of Suydam *v.* Jenkins, 3 Sandf. N. Y. 614, was cited with approval in Baker *v.* Drake. It was an action for the conversion of some flour. The transaction was entirely devoid of *mala fides*. Duer, J., entered into an elaborate discussion of the law of damages. But the court being a lower one, added to the fact that several decisions have been rendered in the court above since upon the subject, have led me to omit any discussion of the case in this place.

4. That the highest value between the time the right of action accrued and the trial is not always the measure of damages.

5. That when the purchase money either has not been paid at all, or only a small portion of it has been, the plaintiff will be restricted in measuring his damages to the price of the stock within a reasonable time after the right of action accrued.

6. If in a marginal transaction the principal, upon being advised of an unauthorized sale of the stocks, desires further to prosecute the adventure, he has the right to disaffirm the sale, and require the broker to replace the stock, and upon failure or refusal to do this, the remedy of the principal is to replace it himself, and the advance in the market price from the time of the sale up to a reasonable time to replace it after notice of sale, affords a complete indemnity, and is the proper measure of damages.

7. Where the consideration has been paid, or where there has been a failure to replace borrowed stock, the measure of damages is probably the highest price between the time the cause of action accrued and the trial, provided the action be brought within a reasonable time, and prosecuted with due diligence.

8 What is meant by a reasonable time seems as yet undetermined.

The question of damages arising out of stock transactions does not seem to have claimed the attention of the courts in Pennsylvania until a comparatively recent period.

In Bank *v.* Reese,[1] the defendant, a bank, refused to issue to the plaintiff the number of shares to which he was entitled, and the court awarded him the highest price between the refusal and the trial, upon the ground that the bank was trustee for the stockholders, and that the refusal was a breach of the trust. But there was considerably more said in this case than was actually decided in it, and the Supreme Court has been occupied in every case which has arisen upon the subject since that time, in stripping it of the dicta in which it abounds.

The dicta referred to were briefly, that the case of stock is an exception to the rule generally applicable to chattels, and the question must always be, what did the plaintiff lose? And he is entitled to all the advantages he could have derived from the stock if it had been delivered at the specified time. Those advantages are the highest market value between the breach and the trial, together with the bonus and dividends which have been received in the meantime. This is the rule when the consideration has been paid; where it has not been paid, the plaintiff should be allowed the difference between it and the value of the stock, together with the difference between the interest on the consideration and the dividends on the stock. Now it is obvious that if the language of Lewis, C. J., is to be considered as rising above dicta, it adopted the highest value rule in all its force, and went as far

[1] 2 Casey 143.

as the New York courts ever did. This case was decided in 1856, and in 1865 a question came before the court as to the measure of damages in a contract for the sale of some stock, which, without the knowledge of the vendor had already been sold by his agent, when he (the vendor) had agreed to sell it to the plaintiff. The plaintiff contended that the case was ruled by Bank *v.* Reese. The court admitted that that case was rightly decided, and added that whenever a similar case occurred they would be governed by it. But this does not include dicta or expressions of opinion which were not essential to the decision, and which were clearly extra judicial. "The moment," said Read, J., "that you establish the relation of trustee and *cestui qui trust* between the bank and its stockholder, the latter is entitled either to have the specific article as of the day on which it should have been delivered to him, or its highest price, with all the dividends declared upon it. This is founded upon the rule of equity that a trustee shall not put into his own pocket any of the profits arising from the trust estate. This is all that was decided in Bank *v.* Reese." The dicta of Lewis, C. J., in that case therefore did not govern the case pending, and the plaintiff was awarded damages only, upon the theory, I suppose, that on refusal to perform the contract, the consideration not having passed, the plaintiff could have gone into the market and bought other shares of the same stock.[1] But in Musgrave *v.*

[1] Welsh *v.* Whitaker, 13 Wr. 114.

Beckendorff, where there had been an agreement to replace the very bonds borrowed, the rule in Bank *v.* Reese was held to apply,[1] and the same was held in Persh *v.* Quiggle,[2] where an agent had tortiously disposed of stock certificates which had been entrusted to him. All these have reference to breaches of trust, as is pointed out by Gordon, J., in the late case of Huntingdon & Broad Top Mt. R. R. *v.* English,[3] which will be noticed presently.

The question came up in a somewhat different shape in Neiler *v.* Kelley,[4] which was an action of trover for some shares of stock which had been pledged as collateral, and sold without notice to the pledgor, although he had never demanded them, nor tendered payment of the debt. The present Chief Justice recognized the rule in trover of the value at the time of conversion, with interest, but thinks that it has been so far modified in stocks that "whenever there is a duty or obligation devolved upon a defendant to deliver such stocks or securities at a particular time, and that duty or obligation has not been fulfilled at that time, the plaintiff is entitled to recover the highest price in the market between that time and the time of the trial." But as such a state of circumstances had not arisen in this case, the plaintiff was only permitted to recover the market value at the time of sale, with interest. The same rule was recognized in Work *v.* Bennett,[5] and Wagner *v.* Peterson.[6]

[1] 3 P. F. S. 310.
[2] 7 P. F. S. 247.
[3] 5 Norris 247.
[4] 19 P. F. S. 403.
[5] 20 P. F. S. 484.
[6] 2 Norris 238.

The recent case of Huntingdon & Broad Top Mt. R. R. *v.* English,[1] is an important one. The facts are somewhat complicated, but as they have no special pertinence to the matter in hand, need not now be recited. The court affirmed the early cases, and explained them at some length, closing with the remark that "as yet there does not seem to be any case on our books which militates against the limitation of the rule of the Bank *v.* Reese, to cases involving a trust, or to those the peculiar character of which renders the application of that rule necessary, in order that justice may be meted out to the parties litigant. The court said that in the case before them the parties had fixed their own rule of compensation, and it was unnecessary to seek any other.

So upon a bill of equity filed against a corporation by parties who had purchased stock fraudulently issued by the president, in excess of the amount authorized by law, the measure of damages was held on the authority of *in re* Bahia & San Francisco R. R.,[2] to be the market value of the stocks at the date of demand by the holder for a transfer, or if no demand were made at the time of filing the bill. Willis *v.* Philadelphia and Darby R. R.[3]

In the very latest case the Supreme Court has reaffirmed the law as laid down in Huntingdon R. R. *v.* English, and stated that the law in this state governing stock contracts when parties stand in *equali jure*, is the same as that governing any other marketable com-

[1] 5 Norris 247. [2] L. R. 3 Q. B. 594. [3] 6 W. N. C. 461.

modity, viz., the value of the stock on the day which it should have been delivered, with simple interest.[1]

The following may be taken as a brief summary of the Pennsylvania law upon this subject:

1. The highest value rule has never been enforced except in one case, viz., where there has been a breach of a trust relation between the parties.

2. In all other cases the measure of damages resembles that applied to any other marketable commodity, viz.,—(a) where the action is purely contractual the rule is, the value of the stock on the day when it should have been delivered, with interest down to the time of the trial; (b) where the action sounds in tort, e. g. trover, it is the value at the time of conversion, with interest to the time of trial.

In the following states the measure of damages is in all cases the value at the time of breach (in trover), or when the articles ought to have been delivered (in contract), interest generally being allowed up to the time of the trial, but in some states only when the consideration has been paid in advance, but always in actions of trover. Maine,[2] New Hampshire,[3] Vermont,[4] Massachusetts,[5] Maryland,[6] Virginia,[7] Louisiana,[8] Ar-

[1] North *v.* Phillips, 8 Norris 250. [2] McKenney *v.* Haines, 63 Me. 74.

[3] Pinkerton *v.* R. R., 42 N. H. 463. [4] Rider *v.* Kelley, 32 Vt. 268.

[5] Fisher *v.* Brown, 104 Mass. 259, Peebles *v.* Boston & Albany R. R. 112, Mass. 498.

[6] Baltimore Marine Insurance Co. *v.* Dalrymple, 25 Md. 269; Thomas *v.* Sternheimer, 29 Md. 268; Third National Bank *v.* Boyd, 44 Md. 47.

[7] Orange R. R. *v.* Fulvey, 17 Grattan 366. [8] Vance *v.* Tourne, 13 Louis 225.

kansas,[1] Illinois,[2] Missouri,[3] Minnesota,[4] Michigan,[5] Kansas,[6] Nebraska,[7] Colorado.[8]

In Delaware, Rhode Island, West Virginia and Oregon the question never seems to have arisen.

In Connecticut the price at the trial may perhaps be taken if the property has risen.[9]

In New Jersey the value with interest is the usual measure.[10] But in an action on a contract, the loss of profit may be recovered if it can be ascertained by ordinary rules of evidence, and with a reasonable degree of certainty.[11]

The highest value rule is adopted in South Carolina and Georgia.[12]

The general rule of value with interest is so far modified in Florida, that in an action of trover for public stocks held as an investment, and like articles held otherwise than for purposes of immediate commerce, it would be equitable and proper that the highest value after conversion should prevail, if the jury should be satisfied from the evidence that the plaintiff would have held the property up to the time of the

[1] Jefferson *v.* Hale, 31 Ark. 286.

[2] Larrabee *v.* Badger, 45 Ill. 441; Deere *v.* Lewis, 51 Ill. 254.

[3] State *v.* Smith, 31 Mo. 566; Spencer *v.* Vance, 57 Mo. 427; Rickey *v.* Ten. Broeck, 63 Mo. 563.

[4] Derby *v.* Gallup, 5 Minn. 119.

[5] Bates *v.* Stansell, 19 Mich. 91; Greeley *v.* Stilson, 27 Mich. 153; Allen *v.* Kinyon, 41 Mich. 481.

[6] Field & Kinnear, 4 Kansas 476; Shepherd *v.* Pratt, 16 Kansas 209.

[7] French *v.* Ramige, 2 Neb. 254.

[8] Cofield *v.* Clark, 2 Col. 101.

[9] West *v.* Pritchard, 19 Conn. 212.

[10] Garretson *v.* Brown, 2 Dutch 426.

[11] Wolcott *v.* Mount, 7 Vroom 262.

[12] Kid *v.* Mitchell, 1 Nott *v.* McCord, 334; Cen. R. R. *v.* At. & Gulf R. R. 50 Ga. 444.

advance in value, for the defendant should make good any loss sustained by reason of his act.[1]

In Alabama, in an action on a contract for the delivery of personal property, at a particular time and place, the measure of damages is the value of such property at the time appointed for delivery, with interest, unless it is shown that the property was to be delivered for some specific object known to both parties at the time of contracting, and that thus a loss within the contemplation of both parties was sustained.[2] The fact that the price has been paid in advance does not vary the rule.[3] In trover, however, the jury may assess the highest value between the conversion and the trial, but they are not bound to do so.[4]

The law in Mississippi is: 1. In the absence of fraud, malice, oppression, or wilful wrong, either in taking or detaining, the damages are the value at the time of taking, conversion or detention, with interest to time of trial. And this is a question of law for the court.

2. When the reverse is true, the measure of damages becomes a matter for the consideration of the jury, guided by the evidence before them.

That under the second rule may be embraced:

1. All cases where the original act was wilful and wrongful.

2. Or where the original act was *bona fide*, but the

[1] Moody *v.* Caulk, 14 Fla. 50.

[2] Bozeman *v.* Rose, 40 Ala. 212.

[3] Rose *v.* Bozeman, 41 Ala. 678; S. C. 51 Ala. 321.

[4] Holly *v.* Flournoy, 54 Ala. 99; Dryer *v.* Lewis, 57 Ala. 552.

subsequent detention, sale or other disposition of the property, after a knowledge of the plaintiff's claim, was wilful and injurious.

3. Or where the original act and the subsequent disposition of the property for a greater price than its market value at the time of the original taking, were all in ignorance of the plaintiff's rights, but the defendant seeks to retain the difference as a speculation.

4. Or where the property in controversy has some peculiar value to the plaintiff, and is wilfully withheld; or he has been deprived of it by the tortious act of the defendant. "In all such cases it is the peculiar province of the jury to find such damages according to the convictions of their own understandings, as are consistent with right; not as a matter of law, but as a rule of remedial justice resting in their discretion.[1]

But the court has lately said that it is incumbent upon the party injured to make reasonable exertion to reduce his damages as much as practicable; if through negligence or wilfulness he allows the damages to be unnecessarily enhanced, he must bear the increased loss.[2]

The highest value rule was adopted in Texas several years ago;[3] but it has recently been so far modified that where the consideration has not been paid in advance, or where extraordinary circumstances have oc-

[1] Whitfield *v.* Whitfield, 40 Miss. 352; S. C. 44 Miss. 254; Storm *v.* Green, 51 Miss. 103.

[2] R. R. *v.* Echols, 54 Miss. 264.

[3] Stephenson *v.* Price, 30 Texas 715; Cartwright *v.* McCook, 33 Texas 612.

curred to produce extreme prices in the article during so long a period of time, over which the suit has been protracted without any fault of the defendant, or where there are other circumstances attending the transaction not in the ordinary course of trade, the highest value will not be allowed, but instead thereof the value at the time of conversion or afilure to deliver, with interest.[1]

In Ohio, where pledged stock is tortiously sold, the highest value between the conversion and the commencement of the suit was awarded in Bates *v.* Wiles.[2]

In Kentucky the enhanced value is not the rule, but the courts have said that cases might arise in which it would be taken into consideration.[3] And the same is true of Tennessee.[4] The highest value is adopted in Indiana, provided the suit be commenced and prosecuted with due diligence.[5] So in Iowa and Wisconsin.[6]

In Nevada the rule of value with interest is so far qualified as to allow in addition any special damage which may legitimately arise out of the transaction.[7]

The history of the law upon this subject in California is extremely peculiar. The Supreme Court of that state, in Hamer *v.* Hathaway,[8] adopted the highest value rule, but a case arose a few years later which put the court in an unfortunate position. In May, 1863,

1 Hillbroner & Douglass, 42 Texas 402.

2 1 Handy 532.

3 Greer *v.* Powell, 1 Bush 489; Miles *v.* Miller, 12 Bush 134.

4 Merchants' National Bank *v.* Trenholm, 12 Heiskill 520.

5 Kent *v.* Ginter, 23 Indiana 1.

6 Stapleton *v.* King, 40 Iowa 278; Weymouth *v.* C. & N. W. R. R., 17 Wis. 550.

7 Boylan *v.* Huguet, 8 Nevada 345; Bereich *v.* Marye, 9 Nev. 312.

8 33 Cal. 117.

the defendant had wrongfully replevied hay crops, then not worth over $2500. The following year, in consequence of a drought, the price of hay rose enormously, and the jury having been allowed to assess the plaintiff's damages at any market rate after the conversion, with interest, found a verdict for $25,763.37. Obviously this was nothing more than the rule carried to its logical conclusion. But the proposition that a man should recover twenty-five thousand dollars when his actual loss was but twenty-five hundred, was too preposterous for any court to sanction. Hamer *v.* Hathaway was accordingly overruled, and the law in that state is now declared to be in an action for the conversion of personal property, that the plaintiff may elect to take judgment either for the value of the property at the time of conversion, with interest from that time, or where he has prosecuted the suit with reasonable diligence, the highest market value at any time between conversion and verdict, without interest, and if he fails to elect, the court will do so for him.[1]

I have thus reviewed at great length, but I trust not unprofitably, the decisions in England and America, upon this very interesting but very intricate branch of the law. Perhaps we may merit Mr. Mayne's sneer "that the law in America is as usual in hopeless con-

[1] Page *v.* Fowler, 39 Cal. 412; Atherton *v.* Fowler, 46 Cal. 320; Barante *v.* Garratt, 50 Cal. 112.*

* The above classification of the law upon this subject in the several states is carried down to the latest reports. It includes the decisions in all the states, and pains have been taken to make it thoroughly accurate.

flict." But tangled as it undoubtedly is, I think if we consider the decisions with any care, we are struck with their gradual approach toward a correct principle. This is noticeable more particularly, in the states where questions of this nature are constantly arising.

The rule in the early stages of the law was inexorable, and any intermediate value would have been excluded, but owing to hardships which resulted in several cases a different rule crept in, often it would seem with very little consideration of what that rule would lead to if followed to its legitimate logical conclusion. The decision of the court below, in Page *v.* Fowler, just cited, affords an excellent illustration of what is meant. In the early cases in that state, the highest value rule had been adopted, but when Page *v.* Fowler arose it would have been monstrous to have allowed the plaintiff, who had not brought his action until nearly six years after the tort, to recover the value of the hay at the time of a drought, when in all probability he would have sold it long before the drought occurred. This case is cited simply to show the limit to which this rule can be logically carried. The court was forced by the first principles of justice to establish some other system of computation.

It seems very reasonable, however, that in certain cases the plaintiff should not be restricted to the old measure of damages, but it appears equally clear that the other extreme should not prevail, and he be allowed to roam over the whole field of time until the statute of limitations would bar his claim, and select

the highest value, where in ninety-nine cases out of a hundred he would never have sold at any such price; by so doing there seems to be an entire departure from the normal theory of damages, namely, compensation, and a substitution for it of a chance of winning a prize. Every delay in the trial of the cause would be hailed with delight by the plaintiff, especially if the stock market was rising. He has absolutely nothing to do but remain passive, and elect a date when he will have the value computed. This method may in some cases of aggravated tort, be entitled to some consideration, but in the vast majority its demerits far outweigh any advantages claimed for it.

The courts appreciating the difficulty have suggested various modifications of it, which sufficiently appear from the cases just cited. One is that the plaintiff be compelled to begin and prosecute his suit, within a reasonable time, but then the perplexing but by no means unanswerable question arises, What is a reasonable time? This might be readily left to the jury, who could decide whether under all the circumstances of the case, the plaintiff had proceeded to bring suit immediately upon the conversion or breach of contract, and had prosecuted it without needless delay. There is this to be said in favor of the highest value rule, that if it is ever to be applied, it certainly would appear to be most fitly suited to stock.

The argument used against it with reference to wheat, hay, etc., namely, that from their nature they must be consumed within a limited period, does not

apply at all to stock which is generally bought for investment, though doubtless often for speculation. In many cases, however, a man will buy stock with no intention of selling, but that intention will, in a large majority of cases, be dissipated should the value be enhanced to any great extent. The same may be said of every other kind of non-perishable property. A man will buy a house, not for speculation, but to live in, yet if some one offers him a large price for it he will sell, although entirely contrary to his original intention. Yet in neither case could it be truly said that he bought for speculation.

The difficulties surrounding the subject are doubtless very great, but as has been observed, the courts in the states where the question is constantly arising, seem to be tending toward a sound general rule. Notably is this the case in New York, where the whole subject has undergone the most elaborate investigation from the ablest judges in countless cases. The conclusions reached by them, which have been given, seem to me to show a way out of the difficulty, and we have just reason to hope that at no distant day this subject, which has puzzled the jurists for the last hundred years, may have a solution which, although not perhaps calculated to work exact justice in every case, may at least serve to indemnify the plaintiff for the loss sustained by him, without subjecting the defendant to a liability which savors rather of punitive than compensatory damages.

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